

Book Review: Commercial Law and Human Rights, by Stephen Bottomley and David Kinley (eds)

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Book Review

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COMMERCIAL LAW AND HUMAN RIGHTS EDITED BY STEPHEN BOTTOMLEY & DAVID KINLEY (ALDERSHOT, VERMONT: ASHGATE, 2002) 341 pages.¹

BY FREYA KODAR²

I. INTRODUCTION

Commercial Law and Human Rights, edited by Stephen Bottomley and David Kinley, is a collection of essays written by academics, judges, practitioners, and activists from Australia, Canada, and the United Kingdom. The essays examine corporate and commercial regulation and human rights protection in areas ranging from domestic and global business, transnational litigation, taxation, administrative law, labour law, Aboriginal title claims, and intellectual property.

II. SUMMARY

Following Sir Anthony Mason's overview,³ the collection opens with a series of essays that look at various aspects of corporate law. In the first

¹ [*Commercial Law and Human Rights*].

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³ Sir Anthony Mason, "Comment on Papers Presented at the Commercial Law and Human Rights Conference," in Bottomley & Kinley, *supra* note 1, 1.

essay, David Kinley traces initiatives, from the mid-1970s onwards, to subject local and transnational corporate behaviour to human rights standards.⁴ These initiatives include efforts by supra-national bodies, such as the United Nations, the International Labour Organization, and the European Union, to include “social clauses” in trade and aid agreements and initiatives at the domestic level such as ethical investment, fair trading initiatives, and various forms of codes of conduct.⁵ Kinley reviews the state’s indirect and direct obligations to ensure that private actors respect the human rights protections in many international instruments and developing jurisprudence in this area. Finally, Kinley examines the case law with respect to the application of extra-territorial laws to the behaviour of domestic corporations outside of the country.

In their discussion of Amnesty International’s work with the corporate sector, Rory Sullivan and Des Hogan present an activist perspective on the successes of many of the initiatives Kinley canvasses.⁶ The authors present Amnesty International’s rationale for working with the corporate sector, providing specific examples of the link between corporations and human rights violations, outlining Amnesty International’s expectations of the business sector and presenting its “business case for human rights.”⁷ Robert McCorquodale reviews the legal obligations of corporations to uphold human rights as well as their legal ability to consider human rights issues in their decision making.⁸ He concludes that “it would now be a reckless TNC [transnational corporation]—and perhaps a negligent legal advisor to a TNC—that did not take human rights issues into account in its decision-making in the twenty-first century.”⁹

Essays by James Strachan and John McMillan illustrate the growing need at the domestic level for commercial lawyers to become more familiar with human rights jurisprudence. Strachan discusses the impact of the United Kingdom’s *Human Rights Act 1998* (HRA)¹⁰ on commercial law

⁴ David Kinley, “Human Rights as Legally Binding or Merely Relevant?” in Bottomley & Kinley, *supra* note 1, 25.

⁵ *Ibid.* at 30.

⁶ Rory Sullivan & Des Hogan, “The Business Case for Human Rights—The Amnesty International Perspective” in Bottomley & Kinley, *supra* note 1, 69.

⁷ *Ibid.* at 69.

⁸ Robert McCorquodale, “Human Rights and Global Business” in Bottomley & Kinley, *supra* note 1, 89 at 9.

⁹ *Ibid.* at 113.

¹⁰ (U.K.) 1998, c. 42.

practice and argues that the most important human rights in the commercial law context will be the rights to privacy, freedom of expression, property, and a fair trial.¹¹ He suggests that the broad scope of the HRA's application should create "a new culture of rights where all members of society will have a greater opportunity and likelihood of appreciating [these] rights."¹² McMillan notes that human rights standards are increasingly considered in the "commercial domain of administrative law" in Australia.¹³

The essays on the relationship between human rights and corporate law are supported by Stephen Bottomley's analysis of the corporate form. Bottomley argues that the structure of the corporation, particularly its separate legal personality, the separation of corporate ownership and control, and the primacy of shareholders and shareholder value, make it possible for corporations to violate human rights.¹⁴ He notes that even corporate actions to protect or promote human rights are often motivated by the shareholder value imperative.¹⁵ Bottomley provides an interesting discussion of the debate over whether corporations should be able to claim human rights protections and presents compelling arguments on both sides. One observation that might usefully be taken up by the corporate social responsibility movement is his suggestion that allowing corporations to claim human rights protections could "sharpen the claim that corporations owe human rights responsibilities to others."¹⁶

Bottomley concludes his essay with a call for a constitutionalist approach to corporate law and governance that focuses on the rights of shareholders, both as members of the company and investors, that "sees a corporation as a constitutional arrangement between managers and shareholders (considered as members)."¹⁷ Thus, corporate law would

¹¹ James Strachan, "The Human Rights Act 1998 and Commercial Law in the United Kingdom" in Bottomley & Kinley, *supra* note 1, 161 at 177.

¹² *Ibid.* at 185.

¹³ John McMillan, "Administrative Law, Commerce and Human Rights" in Bottomley & Kinley, *supra* note 1, 257 at 260.

¹⁴ Stephen Bottomley, "Corporations and Human Rights" in Bottomley & Kinley, *supra* note 1, 47.

¹⁵ *Ibid.* at 57.

¹⁶ *Ibid.* at 62.

¹⁷ *Ibid.* at 66. As he indicates, Bottomley has written elsewhere about the constitutionalist theory of the corporation. See e.g. Stephen Bottomley, "From Contractualism to Constitutionalism: A Framework for Corporate Governance" (1997) 19 Sydney L. Rev. 277; Stephen Bottomley, "The Birds, the Beasts, and the Bat: Developing a Constitutional Theory of Corporate Regulation" (1999) 27 Fed. Rev. 243.

recognize the political and economic character of the corporation and pay attention to the protection of the shareholders' rights in decision-making processes and results. Bottomley argues that such a "rights-regarding" approach working from within the corporation is the best prospect for better corporate governance, more responsible corporate citizenship, and, ultimately, for improved corporate behaviour with respect to human rights.¹⁸

Christine Parker and Leon Wolff take up the challenges outlined in the opening essays to consider the corporation as a political and economic entity with a responsibility to protect human rights. The authors attempt to determine the conditions under which the corporate governance of human rights can be effectively achieved by comparing Australian and Japanese corporate experiences in addressing sexual harassment. An important conclusion is that effective corporate enforcement of human rights guarantees is possible, "but only if there is strong public consciousness of the existence of the relevant right, an influential and ongoing social movement supporting it, and a strong legal regime holding individuals and companies accountable for breaches."¹⁹ This statement echoes the observations of other contributors to the collection: that an important component of initiatives to ensure that corporations live up to their human rights obligations is the possibility of legal or quasi-legal sanctions for non-compliance and the existence of independent systems to monitor compliance.²⁰

The remaining essays in the collection consider specific human rights and their relationship to commercial law. Claire Young discusses Canadian equality rights jurisprudence with respect to income tax legislation.²¹ She makes a number of important observations about human rights in the income tax context. First, although the human rights protections enshrined in the *Canadian Charter of Rights and Freedoms*²² apply to it, "[i]ncome tax legislation is, by its very nature, both overtly and systemically discriminatory in application."²³ Second, litigation may create the impetus for a legislative remedy even when equality-seeking claimants

¹⁸ *Supra* note 14 at 65-68.

¹⁹ *Ibid.* at 135-36.

²⁰ See e.g. Kinley, *supra* note 4 at 45; Bottomley, *supra* note 14 at 57-59; Sullivan & Hogan, *supra* note 6 at 76-77, 86-87.

²¹ Claire Young, "Equality, Freedom and Democracy" in Bottomley & Kinley, *supra* note 1, 235.

²² Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²³ *Ibid.* at 251.

are unsuccessful in court. Third, the “real test of the extent of the *Charter*’s application to the tax system will be a case in which ... the cost to the state of remedying the discrimination will be significant.”²⁴

Andrew Bell considers recent developments in the case law surrounding the right of transnational litigants to a fair trial.²⁵ He examines the tensions in the relationships between the right to a fair trial, the doctrine of *forum non conveniens*, and the principle of judicial comity. He looks at these relationships in the context of access to, and equal treatment before, the courts, and the enforcement of foreign judgments. Bell identifies “significant overlaps between private international law doctrines and human rights concerns.”²⁶

Other essays look at recent developments in the relationship between commercial law and human rights in the contexts of labour law and of aboriginal title in Australia.²⁷

Two essays examine intellectual property in the human rights context. Sam Ricketson provides a discussion of intellectual property rights and their relationship to other human rights.²⁸ He outlines the ways that domestic and international intellectual property regimes have sought to balance competing rights and analyzes a number of emerging “problem areas” in which intellectual property rights are increasingly in conflict with other human rights.

Peter Drahos looks at the specific conflict between intellectual property rights in biological resources and the rights to food and health.²⁹ He outlines the international regime that regulates the ownership of biological resources, arguing that it has created the conditions under which they can be marketized. Drahos contends that only a small group of TNCs (biogopolists) is likely to profit from this situation and to acquire control over most industrial uses of biological resources. Drahos argues that this has, and will have, disastrous consequences for the access of most people

²⁴ Claire Young, *supra* note 21 at 254.

²⁵ Andrew Bell, “Human Rights and Transnational Litigation—Interesting Points of Intersection” in Bottomley & Kinley, *supra* note 1, 115.

²⁶ *Ibid.* at 116.

²⁷ Phillippa Weeks, “Labour Law and Human Rights” in Bottomley & Kinley, *supra* note 1, 281; Bryan Horrigan, “Native Title in Commercial Practice—A Question of Human Rights or Risk Management?” in Bottomley & Kinley, *supra* note 1, 295.

²⁸ Sam Ricketson, “Intellectual Property and Human Rights” in Bottomley & Kinley, *supra* note 1, 187.

²⁹ Peter Drahos, “The Rights to Food, Health and Intellectual Property in the Era of ‘Biogopolies’” in Bottomley & Kinley, *supra* note 1, 215.

to the “genuinely universal” rights of food and health.³⁰ Unlike Ricketson, Drahos takes issue with the notion that intellectual property rights are human rights, arguing that “[i]f intellectual property rights are in fact human rights—and it is a big ‘if’—then they are human rights of a rather distinctive kind, much more instrumental in character than other human rights.”³¹ The two authors agree, though, that human rights discourse should be applied within intellectual property regulatory frameworks.³²

III. DISCUSSION

Commercial Law and Human Rights is an addition to the growing literature examining the relationship between corporate and commercial regulation and human rights protection.³³ The editors note that a considerable portion of this literature concentrates on issues of labour practices and workplace health and safety.³⁴ This collection helps to diversify this body of work by addressing a number of other areas in which commercial law impacts human rights protections. For the most part, each essay provides a succinct and comprehensive overview of the area under discussion. The essays by Ricketson and Drahos together provide a particularly good overview of the development of intellectual property rights regimes and emerging human rights issues. Many of the essays will be useful for those interested in Australian law and policy.

However, a number of features limit the collection’s overall strength. The work lacks a strong unifying theoretical or analytical framework despite being drawn from papers presented at a conference organized by the editors. The interrelationships between the issues raised in many of the essays remain unexplored, and there is some repetition in the collection, particularly in the essays focused on transnational corporate regulation.

With the exception of Drahos’ discussion of the rights to food and health, the human rights under discussion are generally civil and political human rights. There is little analysis of the variety of understandings of human rights, or the commercial law implications of recognizing economic

³⁰ *Ibid.* at 233.

³¹ *Ibid.* at 216.

³² *Ibid.* at 233; Ricketson, *supra* note 29 at 212-13.

³³ See e.g. Michael K. Addo, ed., *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International, 1999); Sol Picciotto & Ruth Mayne, eds., *Regulating International Business: Beyond Liberalization* (London: Macmillan, 1999).

³⁴ Bottomley & Kinley, *supra* note 1 at vii.

and social human rights. This may be a function of the fact that the contributors are based in Australia, Canada, and the United Kingdom, where human rights discourse and jurisprudence is rooted in western liberal individualism. Contributions from those working and living elsewhere, particularly in those areas on the receiving end of many of the human rights violations discussed in the collection, might have yielded a richer discussion of the nature of human rights, and their relationship to commercial law.

The assumption of most of the contributors that there is an “overlap between human rights objectives and corporate goals,”³⁵ results in work that focuses only on reforming corporate and commercial law to better protect human rights interests. Several authors do not explore the implications of their suggestions that the public is increasingly dissatisfied with the results of a corporate and commercial law system in which shareholder profit is the primary goal,³⁶ such as whether more fundamental changes are need to the corporate form. And, finally, none of the contributors examines the larger question of whether the capitalist system, with its drive for accumulation, is ultimately inimical to protecting human rights. As Harry Glasbeek has noted, “[w]hen it comes to the functioning, legal architecture, and nature of corporations, most of the ills that need to be addressed actually arise out of the logic of capitalist relations of production rather than because capitalists use corporations.”³⁷

That said, the volume will provide interesting reading for lawyers, academics, and activists working in commercial law and in human rights law. Readers will find individual essays useful and illuminating, particularly as an introduction or background to the area of law and practice discussed.

³⁵ Kinley, *supra* note 4 at 44.

³⁶ See e.g. Bottomley, *supra* note 14 at 60; Sullivan & Hogan, *supra* note 5 at 87.

³⁷ Harry Glasbeek, *Wealth By Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002) at 255.