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BOOK NOTE

HUMAN RIGHTS: FROM RHETORIC TO REALITY. Edited by *Tom Campbell, David Goldberg, Sheila McLean, and Tom Mullen*. Oxford: Basil Blackwell Press, 1st Edition 1986. Pp. 1, 262. \$14.95.

Several faculty members of the School of Law, University of Glasgow, have produced a work entitled *Human Rights: From Rhetoric to Reality*.¹ This book seeks to define, in concrete terms, the parameters within which public lawyers and human rights activists should debate human rights issues. The book examines both the domestic and international settings. It begins with the thesis that by using rhetoric² to criticize current social arrangements, activists can provide alternative approaches to these arrangements based on human rights theories and models. Only by first formulating clear rights-based policies can activists then work toward implementing them through positive laws.

The goals of this book are not merely an exercise in semantics.³ They are important ones, because if legislatures and international organizations do not clearly understand a particular right's scope, or cannot reach a consensus as to the reasons for the existence of a certain right, it is virtually impossible to create laws which respect that right. Further, especially in the international context where much human rights language is often idealistic and vague, it is essential for the continuing development of human rights law that clearly stated principles exist concerning the validity and scope of particular human rights.

The book is organized into eleven chapters. Each chapter concentrates on a particular aspect of the human rights debate. No author has written more than two chapters; because of this, the book suffers slightly from a divergence of emphases. While this may seem a somewhat trivial criticism, it is important because one of the stated purposes of the book, as the preface explains,⁴ is to clarify particular rights and to provide a concrete basis from which to present social alternatives. The book would probably be more effective in reaching this goal if each of the individual authors adhered to a more consistent overall framework.

In order to understand many of the book's themes, the reader should grasp the "core" concept which Esin Orucu⁵ discusses in chapter

1 HUMAN RIGHTS: FROM RHETORIC TO REALITY (T. CAMPBELL, D. GOLDBERG, S. McLEAN, T. MULLEN eds. 1986) [hereinafter cited as HUMAN RIGHTS].

2 "Rhetoric may be regarded as the art of expressing, in linguistic form, thoughts and feelings in ways which most efficaciously communicate them to others. Its objective is persuasion, and its method is argumentation rather than deliberate manipulation. It seeks to convince, but not to deceive." HUMAN RIGHTS, *supra* note 1, at 1-2.

3 "This book tackles, in concrete contexts, problems which arise in translating the idea of universal human rights into specific practical requirements. It explores ways in which the simple and uncompromising moral imperatives which are expressed in the rhetoric of human rights may be applied to actual social circumstances in a manner which can be accurately monitored and adjudicated in courts of law." *Id.* at preface.

4 *Id.* See *supra* note 3.

5 Senior Lecturer in Comparative Law, University of Glasgow.

three.⁶ This useful analytical approach is illustrated, for example, in the constitutions of West Germany and Turkey.⁷ It begins with the presupposition that the essence of a right—its core—is inviolable; that is, the state may not encroach on the core for any reason. Surrounding the core is a circumjacence of concomitant rights, and finally at some point away from this circumjacence is an outer edge. For the state to limit a particular right it must meet certain levels of state interest at each stage or “concentric circle” surrounding the core in order to preserve the right in question.

The core concept and Orucu’s treatment of it is useful for several reasons. First, it recognizes that the state may have legitimate reasons, such as state security,⁸ for limiting its citizens’ freedoms. Second, it provides the individual with a definite area of freedom into which the state cannot encroach for any reason. Finally, the analytical simplicity of the concept makes it an easily understandable and thus easily articulable model, an attribute which lends itself to ready implementation.

The author of this section also argues that, in order to move from human rights rhetoric to legal reality, a bill of rights or legislation should positivize the cores of particular rights. Orucu claims that this positivization of the core, although important to lawyers, judges and legislators, may be more important to ordinary citizens because it would inform them of the essential content of their rights. This argument is persuasive because positivization would provide a more consistent application of rules, provide better notice to citizens, and eliminate or reduce ad hoc judgments by the judiciary with regard to alleged human rights violations.

In the first chapter addressing a particular right,⁹ Noreen Burrows¹⁰ discusses women’s rights. She argues persuasively that states and international bodies have incorrectly concentrated on eliminating discrimination against women rather than on defining a body of rights which are peculiar to women’s needs.¹¹ She points out that women, whether by choice or necessity, operate predominately in the domestic sector. Consequently, women need rights that protect their interests in that setting. Although some countries, such as the United Kingdom, have made advances in this respect (freedom from violence within marriage and easier availability of abortions), the author claims that these are only preliminary steps in the right direction. Burrows believes, for example, that women should have the right to a minimum wage for child-care and domestic chores and a right to literacy if they so choose.¹² The author concludes that only by identifying a group of rights particular to wo-

6 HUMAN RIGHTS, *supra* note 1, at 37-59.

7 GRUNDGESETZ [GG] art. 19/2 (W. Ger.) and TURK. CONST. art. 11/2 (Turk.).

8 HUMAN RIGHTS, *supra* note 1, at 43.

9 *Id.* at 80-98.

10 Lecturer in European Law, University of Glasgow.

11 “[C]oncentration on the elimination of discrimination obfuscates the central issues in respect of the status of women. These are that women occupy a different place in society from men and that their role is undervalued or discounted.” HUMAN RIGHTS, *supra* note 1, at 97.

12 Burrows points out that women make up the majority of the world’s illiterates. She argues that literacy for women would help them assert their individual dignity. *Id.* at 85-86.

men's situations and by developing a better enforcement procedure, especially in the international context, will women truly have "equal" rights.

Burrows' proposals may seem somewhat radical, but her arguments are clear and cohesive and convincingly supported. If one agrees with her thesis that women's roles in society are undervalued and that this inequity should be remedied, it follows that changes should be made in the present system which more proportionately compensates women for their contributions, whether these contributions be domestic or public.

In the next chapter,¹³ Sheila McLean¹⁴ discusses the right to reproduce. Although this right is often framed in terms of the right *not* to have the state interfere with reproductive choices, McLean contends that this right may be increasingly seen as the state's duty to facilitate reproduction.¹⁵ She acknowledges that a state may limit reproductive rights because of other competing rights, such as the right to life of a viable fetus. She points out, however, that in the twentieth century, with the advent of technology, some countries have severely restricted or completely removed reproductive choices from individuals.¹⁶ She illustrates these restrictions by comparing the status of the right to terminate pregnancy in the United States (where the individual has complete freedom of choice in the first trimester) with the United Kingdom (where the medical profession largely circumscribes that decision). Because she advocates a rights-based approach to reproduction and individual autonomy in reproductive choices, McLean appears to favor the United States' approach. The British approach places an artificial restriction upon a woman's decision and thus encroaches on the core of the right to reproduce without a sufficient reason. Under any personal autonomy analysis, the United States' approach seems the better reasoned. McLean concludes the section by noting that in this area, as in other areas of human rights, rhetoric may have only limited practical significance.¹⁷ Though this assertion may well be true, it is troublesome because one of the book's main themes is that rhetoric *can* be a powerful force for social change.

McLean also authored the section on the right to consent to medical treatment.¹⁸ The relationship between the doctor and patient is, she rec-

13 *Id.* at 99-122.

14 Lecturer in Forensic Medicine and Science, University of Glasgow; Director of the Institute of Law and Ethics in Medicine; and editor of *LEGAL ISSUES IN MEDICINE* (1981).

15 *HUMAN RIGHTS*, *supra* note 1, at 99.

16 McLean does not specify which countries she is referring to, but countries such as China and India have severely limited the number of children a couple may have. The Indian province of Maharashtra provides for compulsory sterilization of the male after the birth of a couple's third child. If the father refuses the operation, the mother is obliged to undergo a tubectomy. The sanctions for failure to comply with these laws are up to six months in prison or a fine of 100 to 500 rupees. For a full discussion of this law and other reproduction restrictions, see Note, *India's Compulsory Sterilization Laws: The Human Right of Family Planning*, 8 CAL. W. INT'L. L.J. 342 (1978).

17 McLean notes that human rights rhetoric's most practical value is as a "method of highlighting the problem of removing existing capacities . . .," but recognizes that a paradox faces human rights practitioners: The state is not only the one who has fostered the need for human rights protections, but is also going to have to be the main force in guaranteeing reproductive rights. *HUMAN RIGHTS*, *supra* note 1, at 120.

18 *Id.* at 148-72.

ognizes, nearly always dominated by one party, the doctor, who possesses a much greater degree of information and technical expertise than the patient. Consequently, in order for the patient to determine his own medical treatment, the doctor-patient relationship must have a high degree of trust. She contends that not only must the patient trust the doctor, the doctor must trust that the patient can cope with potentially negative diagnoses and be able to make decisions that affect his or her bodily integrity. She also argues that doctors must fully disclose to the patient in order for the patient's consent to be properly termed "informed." She argues that even if the patient does not completely understand all of the information that he receives, it may lead to a fuller discussion about the proposed treatment. This area of human rights debate is in part different from other areas because it is seen as a balancing of competing "goods"—the medical profession and the law.¹⁹ It may therefore serve as the classic example of the types of decisions which occur that limit the application of human rights laws.

A somewhat related or perhaps complementary chapter concerns the rights of the mentally-ill,²⁰ who are often not able or not allowed to exercise treatment choices. Tom Campbell²¹ points out that this is a very problematic area of human rights debate. He suggests that when people lose the capacity to reason, their very humanity, which is at the base of any human right, is put in issue.²² Campbell explains that it is difficult to fit the mentally-ill into any existing model of rights. It is incorrect, he maintains, to treat them as children, especially when considering illnesses such as schizophrenia or manic depression which are often episodic in character. With these types of mental illnesses, the patient at times is as lucid and rational as a "normal" adult. It is equally incorrect, however, to place the mentally-ill in with the traditional model of man as a rational self-interested person free to communicate views and pursue individual happiness.²³ Another model, the "autonomy model," attempts a compromise by allowing the mentally-ill to exercise the same rights as other people in areas in which they remain normal.²⁴ Campbell maintains that this approach fails to consider any of the specific problems that the mentally ill face, and fails to offer reasons why society should protect their interests at all. Campbell seems to advocate an interest or

19 McLean is merely pointing this out as a contrast between most human rights which are seen as a conflict between something inherently dangerous or wrong (abuse of power by the state, for example) and the individual's right to personal autonomy. *Id.* at 148.

20 *Id.* at 123-47.

21 Professor of Jurisprudence, University of Glasgow; and author of *SEVEN THEORIES OF HUMAN SOCIETY* (1981).

22 "The rights of the mentally-ill are problematic because the humanity of those who have lost the capacity to reason may be questioned." *HUMAN RIGHTS*, *supra* note 1, at 123.

23 "In fact, the model of Man traditionally associated with those who favour civil rights is of a person somewhat beyond the 'norm' in the sense of the normal: an active, rational and entrepreneurial person for whom the life which is claimed is one in which there is a degree of self-expression, self-help, and self-defense: the opportunity to have and to manage property, to communicate views and pursue happiness along individually chosen lines, to share in government and freely go about day-to-day activities without the interference of officials and prohibitions of the state beyond those strictly necessary for the defense of the rights of others." *Id.* at 126.

24 For example, under the "autonomy model" there is no reason to restrict mentally-ill people's voting rights or the right to communicate with others.

benefit theory²⁵ of rights because not only is it consistent with the direction in which current debate is heading, but also because it pushes the debate toward viewing rights as positive duties of the state to accommodate its citizens.²⁶

This point relates also to Campbell's belief that the state should focus less on curing mental illness and more on preventing it.²⁷ He mentions that one way the state could accomplish this goal is by attempting to remove some of the stresses from society, but he does not fully elaborate on this point. This approach parallels the current emphasis that governments place on the prevention of physical ailments, such as lung cancer and various diseases by publishing information and warnings about cigarette smoking and providing vaccination programs for citizens. Campbell should realize, however, that the causes of mental illness are much less clear than the causes of most physical illnesses, and that it is virtually impossible for governments to remove stress from society. Thus, his suggestion is much easier said than done.

Campbell concludes this section with a word of caution: Human rights activists subscribing to an interest or benefit theory must be careful to monitor paternalistic practices designed to protect the mentally-ill from themselves. This vigilance is necessary, he contends, in order to prevent the state from using the label "mentally-ill" as a pretext for intervening in irrational people's lives merely because they do not conform to society's norms.²⁸ Here, Campbell's concern may be overstated, but he apparently makes this point to emphasize the importance of specific procedural safeguards against such an occurrence.

The next chapter²⁹ deals with the right to public procession and assembly. The author, Jim Murdoch,³⁰ lists four areas where this right generally applies: Freedom of association, static meeting, public procession, and protection against criminal sanctions following a march or meeting.³¹

Although these rights are similar in terms of what people need in order to freely exercise them, the differences among them require a slightly different analytical approach, which Murdoch provides.³² He argues that guaranteeing that the state does not intrude on the right to peaceful protest encourages citizens to participate in governmental decisions, and acts as an effective safety valve for what otherwise might be violent protests. He notes, however, that groups which use violent tac-

25 The "interest" or "benefit" theory bases humanness not on rationality, but on the ability to suffer. Because the mentally-ill are often incapable of alleviating their own suffering, this theory dispenses with the requirement that the right-holder exercise a right. Instead, this theory views rights as rule-defended interests which obligate the state to take appropriate action to protect the individual right-holder. HUMAN RIGHTS, *supra* note 1, at 131.

26 *Id.* at 131, 144.

27 *Id.* at 144.

28 *Id.* at 145.

29 *Id.* at 173-96.

30 Lecturer in Public Law, University of Glasgow.

31 HUMAN RIGHTS, *supra* note 1, at 174.

32 For example, the right to static meetings generally does not interfere with other citizens' rights to use public highways, but the rights to public procession involve balancing these competing interests. *Id.* at 184-92.

tics to gain publicity and a sympathetic following present analytical problems for activists who are developing rights-based theories regarding the right to protest. This section may not be as understandable to American readers because much of the argument centers on British social history, and, of course, Britain lacks a written constitution and declaration of rights. Much of this section discusses the relative merits of a written constitutional system in terms of human rights—a system whose merits are probably well known to Americans. Similarly, Murdoch presents more of an historical perspective on how these rights have developed (or in some cases declined) in Great Britain rather than defining a core of rights which might be more useful to non-British activists and more consistent with other sections of the book.

In chapter ten,³³ Gerry Maher³⁴ discusses human rights in the criminal process. He focuses in part on two British case studies³⁵ as a basis for analysis. Maher contends that human rights discourse has not played an important role in this area of law because lawyers and judges have been chiefly concerned with finding facts accurately and applying rules consistently. This is so, he believes, because of the influence of Utilitarianism and Positivism in British legal history. He points out that, because maximizing utility might entail piercing the core of a certain right, it clashes with the very nature of the core philosophy. Similarly, according to Maher, since Positivism stands for the idea that rights can only exist as posited rules, it conceptually confuses the Positivist to maintain that people have legal rights merely by virtue of their common humanity.

Maher devotes much of this chapter to explaining how human rights rhetoric can indeed be incorporated into the criminal process as an alternative analytical framework. He cites, for instance, *Gideon v. Wainwright*,³⁶ where the United States Supreme Court provided, as a rationale for requiring appointed counsel, that the trial might not result in the proper outcome if the accused was not represented.³⁷ Maher attempts to introduce an approach to this issue that is based on the moral autonomy of the accused. He then proposes that if one considers a criminal trial to be a conversation between the accused and the state, it is essential to the autonomy of the accused that he fully understand the proceeding. He concludes that, in order to facilitate this understanding, the state has a duty to appoint counsel if the accused cannot afford to hire counsel himself.³⁸ Of course, Maher and the other authors must first convince read-

33 *Id.* at 197-222.

34 Lecturer in Jurisprudence, University of Glasgow.

35 Maher focuses on the work of the CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, EVIDENCE (General), 1972, Cmnd. No. 4991. and the (Thompson) COMMITTEE ON CRIMINAL PROCEDURE IN SCOTLAND, SECOND REPORT, 1975 Cmnd. No. 6218. The former studied the accused's right to remain silent in criminal proceedings, and the latter the practice of holding a suspect for questioning without formally charging him. Maher uses these reports to show how human rights analysis has had virtually no impact on criminal procedures policies.

36 372 U.S. 335 (1963).

37 *Id.* at 344-45.

38 In discussing the need for legal aid, Maher asks:

[I]f we argue . . . that our criminal process must display respect for the autonomy of the person on trial, a different justification for legal aid emerges. By treating the accused as an autonomous agent, we must communicate reasons to him or her why it is that proof of guilt

ers and governments that individual autonomy as an end in itself is a valuable or morally good societal goal. Although this section might unnerve Positivists and Utilitarians, it is exceptionally well-written and provides sound arguments for using human rights theory as a method to analyze the criminal process.

The book concludes with a section on the right to trade union membership.³⁹ Elspeth Attwooll⁴⁰ claims this right is merely a specialized form of the right to freedom of association. She defines the core of the right as that "of joining and continuing to belong to any combination of any type in support of economic interests held in common by workers."⁴¹ Attwooll recognizes that in this area, perhaps more than others, the rights which go along with the core right may be of equal importance. She notes, for instance, that it does workers very little good to have a right to strike if the penalty for striking is dismissal, or to have the right to meet if management or the government does not provide the time or the place for such meetings. She also points out the conceptual difficulties of this right when unions try to exclude particular individuals. This difficulty arises because the very definition of the core—that workers can form "any" combination—seems to imply that a union can arbitrarily exclude anyone it chooses. But, she notes, this might encroach on the individual's own right to join. Attwooll distinguishes trade unions from other groups, such as employer associations, by contending that the particular needs of trade unions require a different core of rights to remain effective.

Attwooll explains why workers need particular rights. She does not, however, fully explain why workers, as such, are intrinsically different from the rest of the population and therefore deserve their own unique rights, except to assert that trade union rights are generally accepted in the international community.⁴² This section would be more persuasive if Attwooll first convinced the reader that trade union membership and workers, as workers, had some particular trait that set them apart from others and indicated that they deserved unique protection.

Taken as a whole, the book is difficult to digest. It is full of useful information and interesting theoretical discussions, but wanders away from its central thesis more than occasionally. It seems that the authors go out of their way to use some of the concepts and terms outlined in the introduction, when they would be more comfortable with their own, or at least another, analytical framework. In other words, if the book had not set out to be consistent (for example, if the editors had called this a "collection of essays"), reader expectations might have been different and

against him or her is being carried out. To the extent that the accused cannot fully understand or participate in a trial without legal aid, then respecting that person's autonomy calls for provision of legal aid. Legal aid is not on this view simply a means to an end (such as fact-finding) but is something due to an accused as of right, such a right deriving from the need to respect someone's moral autonomy.

HUMAN RIGHTS, *supra* note 1, at 219.

39 *Id.* at 223-49.

40 Senior Lecturer in Jurisprudence, University of Glasgow.

41 HUMAN RIGHTS, *supra* note 1, at 226.

42 *Id.* at 223.

the reader may have felt more at liberty to pick and choose particular "essays" or chapters to read without fear of missing some overall themes. It turns out, however, that each chapter, with the possible exception of chapter three,⁴³ can be read independently of any other.

The very title of the book, however, implies that rhetoric can be a powerful force for social change. In critiquing this position, one must look beyond the book, to reality, to see how particular rhetoric has influenced it. The process of social change is, of course, a gradual one and thus the true contribution of this book may not be known for some time. With regard to several chapters of this book—the chapters on women's rights, rights of the mentally-ill, and human rights in the criminal process—it may very well be worth the wait.

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⁴³ The reader should be sure to read chapter three because it defines the "core" concept of human rights used throughout the book.

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