

Austin Sarat (ed) *Human Rights and Legal Judgments: The American Story* (Cambridge University Press, 2017, 143pp, £85.00) ISBN 9781107198302 (hb)

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This thought-provoking edited collection on human rights and legal judgments in the US is the product of a symposium, which took place in 2016 at the University of Alabama's School of Law. Its editor, Austin Sarat, is the Associate Dean of, and William Nelson Cromwell Professor of Jurisprudence and Political Science at, Amherst College.

This collection of essays has a particular role to play in furthering the dialogue on human rights protections in the US. Although the US' involvement was pivotal in the development of modern-day human rights protections, it is often criticised for its lack of engagement with international human rights.¹ This edited collection considers how international human rights have permeated the domestic landscape in the US, focusing on how they are used as a tool by social movements, and how they have contributed to US Supreme Court decisions.

The book considers the US' approach to human rights through four main chapters, along with an introduction and an afterword. Sarat makes an initial acknowledgement in the introduction that human rights are an outcome of globalisation (p 5). They are not always considered positively, as some view human rights to be Western ideals forced upon the world (p 5). Others, particularly in the US, believe them to be an encroachment on state sovereignty, and this book aims to explore this particular tension between international human rights and domestic law through four case studies. Cynthia Soohoo discusses youth justice, Erika R. George tackles environmental justice, David Sloss writes about the incorporation doctrine, and Stephen A. Simon asks the question, why do international human rights matter domestically? William S. Brewbaker III's afterword to the book neatly identifies the general theme throughout the chapters: will domestic use of international human rights as 'instruments' help solve constitutional problems in the US? (p 132).

Soohoo approaches the human rights challenge in the US from a practical perspective, as she is the Director of the Human Rights and Gender Justice Clinic at CUNY Law School and Board Chair of the Non-Governmental Organisation, US Human Rights Network. In chapter one, Soohoo identifies that American citizens are beginning to notice the gulf between international human rights and domestic constitutional protections, and, as such, activists in the US have increasingly relied upon human rights to further their causes (p 13). This is particularly prevalent in the criminal justice system, and Soohoo's case study focuses on the reform of solitary confinement and youth justice, using the efforts in New York City and New York State as her case studies (p 14).

As a precursor, she briefly outlines factors that influence successful human rights advocacy (pp 15-17), the role of activists and government officials in translating human rights in the US context (pp 17-19), and the interaction of different levels of government in the United States (pp 19-20).

First, Soohoo considers the impact of human rights advocacy on solitary confinement in New York. The use of solitary confinement has increased in recent years and challenges to its use have often utilised human rights arguments (p 22). This has followed the development of international human rights standards, and the current rule is that placing a person in solitary confinement for more than fifteen days will constitute cruel, inhuman, and degrading

¹ See, e.g., Andrew Moravcsik, 'The Paradox of U.S. Human Rights Policy' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (PUP 2005) 147.

treatment.² Soohoo finds that this clear stance from international human rights has encouraged domestic US NGOs to publish reports on solitary confinement in New York and to advocate before human rights bodies and experts on this issue (pp 25-26). From this, Soohoo identifies that it is now accepted, both at the federal level and in New York, that solitary confinement is a human rights issue (pp 28-32).

Second, the chapter looks at the effect of human rights arguments purportedly safeguarding young peoples' rights within the criminal justice system, particularly in the context of the 'Raise the Age' campaign in New York (p 32). Whilst international law is clear on the fact that when a youth is charged with and convicted of a criminal offence, they must be tried and housed in separate facilities to adults,³ Soohoo finds that the US often does not follow this rule. In fact, NGOs have written reports and advocated before human rights bodies and experts to increase awareness of the US' obligations concerning youth justice (pp 37-38). However, although the 'Raise the Age' campaign was successful for misdemeanour offences in New York, the human rights arguments regarding youth justice have failed to gain the same traction. Soohoo believes this may be because the US has not (and is the only UN member state to not) ratify the Convention on the Rights of the Child, meaning that the rules are not as widely known (p 37).

Soohoo concludes that although international human rights and experts have a role to play in domestic human rights arguments, the international standards are often an aside (p 45). Instead, Soohoo argues that 'the key factor in successful human rights claims is how persuasive the claim is to the American people and not the source of the right' (p 45).

George makes the connection between race and the environment in chapter two, particularly considering the breach of international human rights through 'environmental injustice and race in the United States' (p 46). George describes the 'environmental racism' within the US as 'the disproportionate harmful impacts environmental degradation causes people of color' (p 49). George tackles head on the arguments that this is not racism, but merely an issue of social class, citing a report that shows '[m]ore waste facilities are located in middle-class communities of color than in poor white communities in the United States' (p 51). Although this raises a valid concern surrounding race and the environment, this argument has previously been, and is likely to be in the future, challenged as a facet of social class.

George notes that the term 'environmental racism' has recently been replaced by 'environmental justice', arguing that this dilutes the issue of environmental hazards being more prevalent in communities of colour (p 53). George considers the international human rights framework on environmental rights, alongside the domestic US standards, finding that the international protections are much wider for the right to a clean and healthy environment.⁴ In comparison, domestic litigation on such issues has generally failed, due to the need for a claimant to prove discriminatory intent, an often insurmountable bar.⁵

The US does not readily engage with international law, instead preferring to rely upon its own Constitution to provide adequate protections. Despite this, George outlines the fact that the US is a party to the Convention on the Elimination of All Forms of Racial Discrimination ('CERD') and, notably, unlike the domestic US standard, CERD does not require intention to

² See, United Nations Standard Minimum Rules for the Treatment of Prisoners, UNGA Resolution 70/175, Annex, adopted on 17 December 2015 Rule 44; OHCHR, General Comment 20(44): Article 7 (10 March 1994) UN Doc CCPR/C/21/Rev1/Add3 para 6.

³ Juan Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (5 March 2015) UN Doc A/HRC/28/68 para 16.

⁴ See, Erika R. George, pp 54-69, citing Stockholm Declaration on the Human Environment (16 June 1972); Hague Declaration on the Environment (11 March 1989) 28 ILM 1308; UN General Assembly Resolution 45/94 (1991).

⁵ See George, pp 60-62, citing *Jefferson v Hackney* 406 US 535, 548 (1972) & *Washington v Davis* 426 US 229 (1976).

discriminate.⁶ Furthermore, the US government has presented in front of international human rights bodies on environmental issues (p 65). In its reports to the CERD's treaty body, the Committee on the Elimination of All Forms of Racial Discrimination, the US has expressly used the term 'environmental justice' and conceded that poor areas are often left with 'environmental burdens' (pp 69-70). George indicates that if the US were to adopt the recommendations made by the Committee and properly engage with CERD, this would provide a great deal of assistance to the environmental racism movement (p 73). She concludes that, because of the high burden to prove discriminatory intent domestically, international human rights is the way forward to put a stop to environmental racism (p 75).

Sloss tackles the issue of incorporation, federalism, and international human rights in the third chapter. This is centred on how the incorporation doctrine has been used to make parts of the US Bill of Rights binding upon the US States and the role of human rights in this process. Although Sloss asserts that the US Constitution provides for 'universal values' (p 76), in practice, international human rights provide much wider protections than the Constitution does. For example, the US often relies upon the Eighth Amendment's protection against cruel and unusual punishment as a reason for the reservation it placed against Article 7 International Covenant on Civil and Political Rights.⁷ However, Article 7's prohibition of torture or cruel, inhuman or degrading treatment or punishment is much wider in practice.⁸

Sloss notes that the Supreme Court has historically used a 'selective incorporation' approach, ruling that most, but not all, of the Bill of Rights bind the US States (p 79). To provide a more stable approach to incorporation, he introduces a 'human rights theory' (p 80). Under this theory, the US States will only be bound, through the Fourteenth Amendment, when the specific provisions of the Bill of Rights accord with the protections included in the International Bill of Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights) (p 80). Sloss provides examples showing this human rights theory to be consistent with the Supreme Court's approach to incorporation between 1948 and 1971 (pp 83-94), finding that 'the Court would have reached the same results in 18 out of 20 cases if it had applied the human rights theory' (p 87). He develops the idea that the link between the Supreme Court's selective incorporation of only those rights that align with the International Bill of Rights is because the Supreme Court and the United Nations were both working the same agenda: to push the notion of 'fundamental rights' (p 88).

Sloss argues that this human rights theory is actually more 'federalism friendly' than the current use of selective incorporation, and it goes against the usual grain of international human rights being juxtaposed to federalism (p 94). This argument could lead to a wider dialogue regarding international human rights' role in a federal system, such as in the US, which is vital for the protection and promotion of human rights particularly through the UN mechanisms. One concern that stems from this argument is that, because the right to a jury trial does not feature in the International Bill of Rights, Sloss finds that applying the human rights theory would lead to a number of key jury cases being repealed, including *Ring v. Arizona*.⁹ In *Ring*, the Supreme Court held that, in a death penalty case, the aggravating factors that allow for a death sentence to be handed down, instead of life without the possibility

⁶ See George, p 66, citing Third Periodic Report of the Government of the United States to CERD (10 October 2000) UN Doc CERD/C/351/Add.1 para 18.

⁷ See, Senate Executive Report No 102-23 (1992) 12.

⁸ See e.g., the European Court of Human Rights has found that Article 7 protects against the death row phenomenon, *Soering v United Kingdom* (1989) 11 EHRR 439, 88. However, the Human Rights Committee has generally taken a narrower approach to the European Court of Human Rights, finding that 'prolonged delays in the execution of a sentence of death do not *per se* constitute cruel, inhuman or degrading treatment', but it will take each case on its merits, *Francis v Jamaica* Communication No 606/1994 UN Doc CCPR/C/54/D/606/1994 (1995) para 9.1. Emphasis added.

⁹ *Ring v Arizona* 536 US 584 (2002).

of parole, must be found by the jury not a judge.¹⁰ Repealing *Ring* would set a dangerous precedent in the US capital system, and would potentially breach a death row appellants' right to a fair trial under Article 14 ICCPR. From that perspective, it could be argued that *Ring* is actually compliant with the International Bill of Rights and so could be left as precedent under the human rights theory.

Simon gets to the heart of the problem within the US on this issue in chapter four, asking 'why do international human rights matter in American decision making?' (p 100). In answering this question, Simon examines the particular factors and resources utilised when international human rights are relied upon in the domestic context (p 101). He argues that this particular question is important to answer because, in some areas, 'international human rights' is an inherently positive concept and all nations should abide by these rules. For example, preventing genocide and protecting a human being's dignity (p 105). However, Simon argues, in other areas, particularly when international human rights is used as a tool for 'furthering concrete objectives on deeply contested domestic policy issues', the question should be asked as to why international human rights matters? (p 105).

To pick apart this complex issue, Simon looks to the role of the Supreme Court and how it has considered international human rights both as binding and non-binding law (p 106). To do this, Simon considers four broad areas: the force of international treaties domestically, the Alien Tort Statute, limitations on combatting terrorism, and the use of foreign law in constitutional interpretation (pp 107-21). Simon's examination of Supreme Court decisions under these four areas confirms the well-established notion that the liberal side of the Court is more welcoming of international human rights in the domestic context, whereas the conservative Justices are warier and can sometimes be openly hostile to international human rights. Simon concludes that there are two approaches to international law in the Court. First, a 'sovereigntist' approach, where the Justices have 'resisted any role for international human rights norms in the Court's decision making beyond the application of principles that have received a stamp of authority from the political branches' (p 122). Second, an 'internationalist' approach, where there is 'an emphasis on the importance of a system of international law and of the nation's living up to its responsibilities within that system' (p 125). There has also been a third approach to international law, which was taken by Justice Sandra Day O'Connor in *Roper v. Simmons*.¹¹ In her dissenting opinion in *Roper*, the case that struck down the juvenile death penalty as unconstitutional, she found a middle ground between the 'sovereigntist' and 'internationalist' approaches. In sum, Justice O'Connor believed that international law can play a part in US jurisprudence, but only to the extent it is in conformity with domestic US law.¹²

This book incorporates work from scholars and practitioners, each of which make nuanced and bold arguments that are likely to be challenged by other academics. However, this is certainly a good thing. It will spark debates on the importance of human rights, which is imperative if progress is to be made on the domestic acceptance of international human rights in the US.

¹⁰ Ibid 589.

¹¹ *Roper v Simmons* 543 US 551 (2005).

¹² Ibid 604 (O'Connor J dissenting): '[W]e should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus'.

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