

REASONING RIGHTS

Lazarus,
McCrudden
Bowles

REASONING RIGHTS

COMPARATIVE JUDICIAL
ENGAGEMENT



Edited by Liora Lazarus,
Christopher McCrudden and Nigel Bowles



REASONING RIGHTS

This book is about judicial reasoning in human rights cases. The aim is to explore the question: how is it that notionally universal norms are reasoned by courts in such significantly different ways? What is the shape of this reasoning; which techniques are common across the transnational jurisprudence of human rights; and which are characteristic of particular jurisdictions?

The book, comprising contributions by a team of world-leading human rights scholars, moves beyond simply addressing the institutional questions concerning courts and human rights, which often dominate discussions of this kind, seeking instead a deeper examination of the similarities and divergence of reasoning by different courts when addressing comparable human rights questions. These differences, while partly influenced by institutional factors, cannot be attributed to them alone. Through a set of case studies across selected jurisdictions, this book explores the diverse and rich underlying spectrum of human rights reasoning, as a distinctive and particular form of legal reasoning.

Reasoning Rights

Comparative Judicial Engagement

General Editors

Liora Lazarus
Christopher McCrudden FBA
Nigel Bowles

Co-ordinating Editor

Laura Hilly

Sub Editors

Ryan Goss
Kai Möller
Brett Scharffs
Murray Wesson



• HART •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2014

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

© The editors and contributors severally 2014

The editors and contributors have asserted their right under the Copyright, Designs and Patents Act 1988, to be identified as the authors of this work.

Hart Publishing is an imprint of Bloomsbury Publishing plc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Hart Publishing, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-252-5

Typeset by Hope Services Ltd, Abingdon
Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

Preface

This book adopts an explicitly *comparative* method to the analysis of human rights adjudication. Each contributor to the book was asked to reflect on his or her own jurisdiction, by looking at it through the lenses of other jurisdictions. The aim of the book is, however, to examine judicial reasoning in human rights cases not only by way of a comparative approach but also through the use of what might be called a *problem-centred* comparative approach, through the selection of practical human rights problems and how they are addressed in the jurisprudence of these different jurisdictions, problems that we considered were likely to illustrate the fault lines of differing judicial approaches to human rights.

To achieve these aims, the book draws together human rights and constitutional law theorists and practitioners, selected from a number of jurisdictions, to examine competing judicial approaches regarding four broad themes: the approach to the balancing of rights and public goals (eg through doctrines of proportionality); the relationship between rights and national security; the jurisprudence around religious freedom; and the development of socio-economic rights. We are grateful to all the contributors for throwing themselves into the project with enthusiasm, and for the tolerance they showed at our incessant requests for revisions.

The immediate idea for the book arose from a colloquium on *US Constitutionalism in Decline?: An International Perspective* held at the Rothermere American Institute of Oxford University, in April 2010. The point of the conference was chiefly to draw American constitutional theorists and practitioners into a broader comparative debate with equivalent theorists and practitioners in the United Kingdom, Germany, South Africa, Canada and India. We believed such an engagement was most fruitfully conducted outside of the United States, and that the Rothermere American Institute was a suitable forum in which to hold such an engagement. While the colloquium focused on the question of American 'exceptionalism', it quickly became clear that the book should explore more broadly the diverse approaches to rights interpretation that arose in the discussions. Inclusion of US constitutional approaches remains a connecting thread within and between each of the sections, but the book does not limit itself to the question of American judicial approaches to rights interpretation.

The book was also significantly influenced in its conception and in the methods adopted by the seminar on *Comparative Human Rights Law* which has long been a mainstay of, and one of the most popular subjects in, the taught graduate law (BCL) programme of the Oxford University Law Faculty. Originally conceived by Polyvios Polyviou and Eric Barendt in the late 1970s, it was convened or co-convened by Christopher McCruden, the Professor of Human Rights at Oxford, from 1980 until 2011 when he took up a professorship at Queen's University Belfast. Since that time, Liora Lazarus has worked alongside Sandra Fredman and other law faculty colleagues in the delivery of the course. Several of the contributors to the book either took part in the seminars as students (Ryan Goss, Murray Wesson, Edwin Cameron), or were involved in teaching on the course as teaching assistants or co-conveners (Jeff King) or, in the case of Kai Möller, all three.

Students and co-convenors who took part in that course will see many of their ideas reflected in these pages. We are grateful to them for their unknowing contribution to this book.

The three substantive topics (religion, security, socio-economic) were chosen for three main reasons. The first was topicality: all three topics are the subject of current judicial consideration and illustrate current judicial approaches to rights interpretation. A second reason was the extent to which these topics have occasioned judicial decisions across a wide range of different jurisdictions, thus enabling a comparative approach to be adopted. A third reason was that, since each has already been the subject of extensive comparative scholarship, contributors were able to build their examination on solid foundations. We also devote significant attention to a more 'procedural' topic, the use of proportionality analysis by courts, that cuts across these specific substantive areas, and is central to current comparative discussions of rights adjudication.

After an Introduction by Christopher McCrudden that draws out common themes, and sets out the conceptual, institutional and normative issues that arise from the comparative study of human rights adjudication, the book is divided into four Parts, to reflect these four topics. Each Part was managed by one or more sub-editors who are specialists in the given field. They are: Ryan Goss and Liora Lazarus (Rights and National Security); Murray Wesson (Socio-Economic Rights); Brett Scharffs and Christopher McCrudden (Rights and Religion), and Kai Möller (Proportionality). Part of the plan for this book was to invite a number of scholars from various countries and legal backgrounds, to reflect upon a common set of cases, which should magnify the usefulness of the comparative perspectives that each will bring to the topic. Thus, it was important that the set of cases that we use as our common canon should have been chosen with care. The sub-editors of each Part liaised with the contributors to the section to finalise a list of leading cases for consideration in each section. Whilst we remain committed to the utility of this method, we are not blind to the problem of case-selection in doing comparative human rights analysis: concentrating on just one set of cases may give a highly skewed impression of the way in which a jurisdiction behaves generally. The result is a series of studies in different areas that are illustrative of similarities and differences rather than being comprehensive.

Each sub-editor was then responsible for overseeing the management and production of the comparative contributions on the theme within each Part. It was the responsibility of the sub-editor to stimulate contributors to engage with each other to ensure that a reflexive and comparative process was conducted. Contributors were encouraged to engage not only with the leading cases identified but also with the chapters of other contributors in their Part. Draft chapters were circulated around the group prior to final completion. Finally, the sub-editor was responsible for producing a subject introduction for their Part, providing an overview of the leading cases in issue and situating them in the deeper themes of the book, considering how the chapters fit into the current scholarship on comparative human rights, and what they add to that scholarship. We are deeply grateful to them for the efforts and skills they brought to bear to ensure that these objectives were met.

As General Editors, we must record our deepest gratitude to Laura Hilly, who acted as Co-ordinating Editor throughout. That title does not capture fully or adequately Laura's involvement at almost every stage of the process, nor the extent to which the fact that you, the reader, is holding the book in your hands now is due to her determination, good

humour and dedication. We are also most grateful to Hart Publishing, in particular Tom Adams and Mel Hamill, who guided the book through its production stages with tolerance and expertise. Thank you.

Liora Lazarus worked on this book alongside her primary research during her year as a British Academy Mid-Career Fellow. She is deeply grateful to the Academy for the support for her academic work in general. She would like to thank Miles Jackson for his early work on the Rothermere Conference, Natasha Simonsen for teaching assistance alongside this project, and Christopher Boule for his supportive friendship. Finally, she would like to thank her fiancé, Kim Stern, for her love and creative support of all her work.

Christopher McCrudden was awarded a Major Research Fellowship by the Leverhulme Trust, to work on comparative human rights between 2011 and 2014, when the book was largely conceived and executed. It is difficult to overestimate the extent to which such awards contribute to scholarly activity in the United Kingdom, and he is deeply grateful to the Trust for their generosity and cooperation throughout the Fellowship. He also wishes to thank Queen's University, Belfast and the University of Michigan Law School for granting him a leave of absence to take up the Fellowship. Much of his Introduction was written during a most enjoyable period at New York University Law School during 2013–14, when he was a Joint Straus/Emile Noël Fellow, and a Visiting Fellow at the Center for Constitutional Transitions. He is grateful to Joseph Weiler, Gráinne de Búrca and Sujit Choudhry for their hospitality and collegiality during his stay in New York. As always, he is particularly grateful to Caroline, Joseph and Kathleen for their love and support.

Nigel Bowles wishes to thank Liora Lazarus and Christopher McCrudden for their intellectual fellowship and leadership – both in the stimulating conference that gave form to the idea for the book and in the book's development, writing and editing that has followed. He wishes also to thank his colleagues at the Rothermere American Institute not just for making the Institute the seat of Oxford's conversation with America, but for making it the best place beyond America's shores in which to teach, think, research, and reflect upon how and why the United States has come to be the polity and society that it is. The RAP's perspectives are external, scholarly, and comparative – as this book itself suggests.

Liora Lazarus
Christopher McCrudden
Nigel Bowles
Easter 2014

Contents

<i>Preface</i>	v
<i>Author Biographies</i>	xiii
Part 1: INTRODUCTION	
1. The Pluralism of Human Rights Adjudication <i>Christopher McCrudden</i>	3
I. Method and Scope	3
II. The Adjudicatory Pluralism of Human Rights	11
III. Conclusion	26
Part 2: PROPORTIONALITY	
2. Constructing the Proportionality Test: An Emerging Global Conversation <i>Kai Möller</i>	31
3. Necessity and Proportionality: Towards a Balanced Approach <i>David Bilchitz</i>	41
I. Introduction	41
II. Two Problems with Strict Necessity	43
III. Toward a Moderate Interpretation of Necessity	51
IV. Conclusion	61
4. Proportionality Without Balancing: Why Judicial Ad hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination <i>Jochen von Bernstorff</i>	63
I. Introduction	63
II. Why Ad hoc Balancing is Potentially Detrimental to the Realisation of Collective and Individual Self-determination	68
III. Why Ad hoc Balancing is Unnecessary: A Comparative Perspective	71
IV. Coming Clean: Proportionality Without Ad hoc Balancing	83
5. Proportionality in United States Constitutional Law <i>Paul Yowell</i>	87
I. Introduction	87
II. The European Proportionality Inquiry	87
III. Necessity and Balancing	90
IV. Tiered Scrutiny and Variable Intensity of Review	94
V. The Historical Origins of Proportionality and Balancing in the US and Germany	101
VI. Conclusion	113

Part 3: NATIONAL SECURITY AND HUMAN RIGHTS

6. 'To the Serious Detriment of the Public': Secret Evidence and Closed Material Procedures <i>Ryan Goss</i>	117
I. Introduction	117
II. The Importance of Open Justice	119
III. Balancing Open Justice with Other Public Interests	122
IV. Exploring Ways to Balance Open Justice and Broader Public Interests	124
V. Conclusion	133
7. National Security Law and the Creep of Secrecy: A Transatlantic Tale <i>Tom Hickman and Adam Tomkins</i>	135
I. Introduction	135
II. The <i>Norwich Pharmacal</i> Jurisdiction in English Law	136
III. The <i>Binyam Mohamed</i> Case	137
IV. Reactions to <i>Binyam Mohamed</i>	143
V. National Security Litigation in the US: The Breadth of Secrecy	146
VI. A Clash of Legal Cultures	152
VII. The Wider Impact of the <i>Norwich Pharmacal</i> Issue	155
VIII. Conclusion	159
8. Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and 'Cleared Counsel' in the United States, the United Kingdom, and Canada <i>David Cole and Stephen I Vladeck</i>	161
I. Introduction	161
II. The Processes Explained	164
III. Applicable Principles	170
IV. Identifying 'Best Practices'	171
V. Common Problems	174
VI. Conclusion	176
9. The Secret Keepers: Judges, Security Detentions, and Secret Evidence <i>Shiri Krebs</i>	179
I. Introduction	179
II. Security Detentions, Secrecy and Judicial Review	181
III. Security Detentions in Israel	183
IV. Reasoning Rights: Balancing Security and Liberty in the Shadows of Secrecy	188
V. Realising Rights: The Outcomes of Judicial Review Relating to the Named Individuals	191
VI. Between Reasoning Rights and Realising Rights: <i>Jaber Mamdouch Aberah v IDF Commander in the West Bank</i>	195
VII. The Secret Keepers: Behind the Closed Doors of the Judicial Management Model	198
VIII. Judicial Management vs Special Advocates	204
IX. Conclusion	206

Part 4: RELIGION AND HUMAN RIGHTS

10. The Intersection of Religious Autonomy and Religious Symbols: Setting the Stage <i>Christopher McCrudden and Brett G Scharffs</i>	209
I. Introduction	209
II. Introducing the Cases	209
III. Framing the Issues	213
IV. The Models Applied and Tested	218
V. The Contributions	219
VI. Conclusion	221
11. Principles and Compromises: Religious Freedom in a Time of Transition <i>Carolyn Evans</i>	223
I. Introduction	223
II. Four Approaches to Religious Autonomy at Work Cases	225
III. Conclusion	236
12. State Interference in the Internal Affairs of Religious Institutions <i>Johan D Van der Vyver</i>	241
I. Introduction: The Focus of Sphere Sovereignty Defined	241
II. Internal Powers of Religious Institutions	243
III. Concluding Observations	257
13. The Protection of Religious Freedom in Australia: A Comparative Assessment of Autonomy and Symbols <i>Paul Babie and James Krumrey-Quinn</i>	259
I. Introduction	259
II. The Protection of Religious Freedom in Australia	260
III. Comparative Assessment	266
IV. Conclusion	277

Part 5: SOCIO-ECONOMIC RIGHTS

14. The Emergence and Enforcement of Socio-Economic Rights <i>Murray Wesson</i>	281
I. Introduction	281
II. The Emergence of Socio-Economic Rights	283
III. South Africa and the Culture of Justification	286
IV. India, the United States, and the Promise of Judicial Activism	290
V. The Future of Socio-Economic Rights Jurisprudence	295
VI. Conclusion	297
15. The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review <i>Colm O'Cinneide</i>	299
I. Introduction	299
II. The Orthodox Distinction between 'Permissible' Civil and Political Rights Review and 'Impermissible' Social Rights Review	300

III. The Unstable Distinction between Civil/Political and Social Rights Review	302
IV. The Questionable Legitimacy of the Orthodox Position	305
V. The 'Social Rights Problematic'	307
VI. The Diverse Forms of Social Rights Review	311
VII. Questioning Uniformity: The Case for Diversity in Social Rights Review	315
VIII. Conclusion	317
16. A South African Perspective on the Judicial Development of Socio-Economic Rights <i>Edwin Cameron</i>	319
I. Introduction	319
II. Objections to Socio-Economic Rights	320
III. Setting the Standard for Judicial Review	323
IV. Critical Analysis of the Constitutional Court's Approach to Socio-Economic Rights	325
V. Crafting Appropriate Remedies in Socio-Economic Rights Cases	330
VI. The South African Approach in Comparative Perspective	332
VII. Lessons for Other Jurisdictions	334
17. Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication <i>Anashri Pillay</i>	339
I. Introduction	339
II. Directive Principles of State Policy, Land Reform and the Judiciary	340
III. Public Interest Litigation: Making Directive Principles of State Policy Justiciable	343
IV. Later Cases: Judicial Activism Curtailed?	347
V. Lessons from the Indian Experience of Economic and Social Rights Adjudication	351
VI. Conclusion	355
18. American Exceptionalism over Social Rights <i>Jeff King</i>	357
I. Introduction	357
II. The First Irony: Exceptional Judicial Enforcement of Certain Social Welfare Rights	358
III. The Second Irony: Mixed Results	368
IV. Potential Causes	374
V. Conclusion and Lessons for Other Countries	376
<i>Index</i>	379

Author Biographies

General Academic Editors

Nigel Bowles

Nigel Bowles is the Director of the Rothermere American Institute, and a Fellow of Corpus Christi College Oxford. Prior to taking up this post in September 2011, he was for more than 20 years Tutorial Fellow in Politics at St Anne's College, Oxford. He was previously a staff member in the House of Commons before being appointed a Lecturer in Politics at the University of Edinburgh. His intellectual interests lie in American political history and, in particular, in the history of the US Presidency. Among his publications are *The White House and Capitol Hill*, an exploration of the politics of presidential lobbying; and *Nixon's Business: Authority and Power in Presidential Politics* in which he examines the relationship between authority and power in five cases of President Nixon's leadership of economic policy.

His outside interests include music (especially solo piano, and eighteenth and nineteenth-century chamber music), cricket, food, and charities working in the environmental, educational, and heritage sectors.

Liora Lazarus

Liora Lazarus is an Associate Professor in Law, Associate Director of the Oxford Human Rights Hub, and Fellow of St Anne's College. Her primary research interests are in comparative human rights, security and human rights, comparative theory and comparative criminal justice. She has published a monograph, *Contrasting Prisoners' Rights* (OUP, 2004) and a number of shorter pieces in criminal justice, security and human rights. She co-edited *Security and Human Rights* (Hart, 2007) with Ben Goold and has since completed a number of public reports on various aspects of human rights for the UK Ministry of Justice, The UK Stern Review into the treatment of Rape Complaints, and the European Union Parliament. Liora has just come to the end of a British Academy Mid-Career Fellowship. This has enabled her to undertake research towards the completion of two monographs entitled *Securing Legality* and *Juridifying Security*, which are due to be published by Hart Publishing in 2015 and 2016 respectively. The continuing work on these books is supported by the Oxford Martin Programme on Human Rights for Future Generations.

Christopher McCrudden

Christopher McCrudden is Professor of Human Rights and Equality Law, Queen's University Belfast, and William W Cook Global Law Professor at the University of Michigan Law School. He is a graduate of Queen's University Belfast (1970–74). He was awarded a Harkness Fellowship in 1974 and spent two years at Yale Law School (1974–76), and then at Oxford University as a doctoral student, first at Nuffield College (1976–

77), and then at Balliol College as a Junior Research Fellow (1977–80). He was elected as Fellow and Tutor in Law at Lincoln College, and CUF Lecturer in the Oxford Law Faculty in 1980, and Professor of Human Rights Law in 1998. He is a barrister at the English Bar (Gray's Inn) and has been called to the Northern Ireland Bar; he is a Non-Resident Tenant at Blackstone Chambers. He is the author of *Buying Social Justice* (Oxford University Press, 2007), for which he was awarded a Certificate of Merit by the American Society of International Law in 2008, and (with Brendan O'Leary) *Courts and Consociations: Human Rights versus Power Sharing* (Oxford University Press, 2013). He has also edited *Understanding Human Dignity* (Oxford University Press, 2013). He serves on the editorial boards of several journals, including the *Oxford Journal of Legal Studies*, the *International Journal of Discrimination and the Law*, and the *Journal of International Economic Law*, and is co-editor of the *Law in Context* series. He serves on the European Commission's Expert Network on the Application of the Gender Equality Directives. In 2006, Queen's University, Belfast, awarded him an honorary LL.D. He was elected a Fellow of the British Academy in 2008, and in 2011 he was awarded a three-year Leverhulme Major Research Fellowship. In 2013–14 he was a Straus Fellow at New York University Law School, and in 2014–15 he will be a fellow at the *Wissenschaftskolleg* in Berlin.

Co-ordinating Editor

Laura Hilly

Laura Hilly is currently undertaking a DPhil in Law at the University of Oxford. Her research project is supervised by Professor Nicola Lacey and Professor Sandra Fredman. It considers the contribution that gender diversity brings to appellate courts in common law jurisdictions. She completed her BA/LLB at the Australian National University, and then worked at the Federal Court of Australia as an Associate to the Honourable Chief Justice Black AC; and as a litigation solicitor at Blake Dawson. With the support of a Rhodes Scholarship she came to Oxford in 2009, completing the BCL in 2010, and her MPhil dissertation entitled *A Woman's Contribution: Gender Diversity and the Judicial Process* in 2011. Her DPhil research is supported by a Clarendon Scholarship. She is the former Chair of Oxford Pro Bono Publico and a current Managing Editor of the Oxford Human Rights Hub Blog.

Sub Editors

Ryan Goss

Ryan Goss is Lecturer in Law at the Australian National University, Canberra. Ryan's research focuses on public law and European human rights law, particularly fair trial rights; he teaches public law and human rights law. His book, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights*, will be published by Hart Publishing in 2014. A Rhodes Scholar from Queensland, and previously Junior Research Fellow in Law at Lincoln College, Oxford, Ryan has been at the ANU since mid-2013.

Kai Möller

Kai Möller is Associate Professor of Law at the London School of Economics and Political Science. His previous positions include a Junior Research Fellowship and a Lectureship in Jurisprudence at Lincoln College, Oxford. He holds a PhD in law from Freiburg University and MJur, MPhil and DPhil degrees from Oxford. His research is mainly in the areas of constitutional theory and comparative constitutional and human rights law. His most recent book, *The Global Model of Constitutional Rights*, was published by Oxford University Press in 2012.

Brett Scharffs

Brett Scharffs is Francis R Kirkham Professor of Law at Brigham Young University's J Reuben Clark Law School, Associate Dean for Research and Academic Affairs, and Associate Director of the International Center for Law and Religion Studies. His teaching and scholarly interests include constitutional and comparative law, law and religion, international business law, philosophy of law, and legal reasoning and rhetoric. His articles include 'The Role of Humility in Exercising Practical Wisdom' (*UC Davis Law Review*), 'Adjudication and the Problems of Incommensurability' (*William and Mary Law Review*), 'Law as Craft' (*Vanderbilt Law Review*), and 'The Character of Legal Reasoning' (*Washington and Lee Law Review*). His casebook, *Law and Religion: National, International and Comparative Perspectives* (co-authored with W Cole Durham, Jr), has been translated into Chinese, Vietnamese, and Turkish, and is scheduled for a second English edition in 2014. He is currently writing a book about legal reasoning and rhetoric. He has served as Chair of the Law and Religion Section of the Association of American Law Schools, and is currently Chair-elect of the Law and Interpretation Section of the AALS. He is on the editorial board of the *Oxford Journal of Law and Religion* and the Advisory Board of the Research Unit for the Study of Society, Law and Religion at the University of Adelaide.

Murray Wesson

Murray Wesson's research is in the areas of constitutional and human rights law. He is currently working on a monograph entitled *The Limits of Constitutional Justice* that will be published by Hart Publishing in 2015, and has published a number of articles and chapters on human rights. He completed his LLB at the University of KwaZulu-Natal in Durban, South Africa. He then studied at the University of Oxford on the KwaZulu-Natal Rhodes Scholarship, where he completed a Bachelor of Civil Law, MPhil and DPhil degrees. He has taught at the Universities of KwaZulu-Natal, Oxford and Leeds, and been a visiting lecturer at the Central European University in Budapest and the Law Institute in Jersey. He is an Associate Professor at the Faculty of Law, University of Western Australia.

Authors

Paul Babie

Paul Babie is Associate Professor and Reader in Law and Associate Dean of Law (Research), Adelaide Law School, Associate Dean (Research), Faculty of the Professions,

and Director, Research Unit for the Study of Society, Law and Religion (RUSSLR), at the University of Adelaide. Paul holds a BA in sociology and political science from the University of Calgary, a BThSt from Flinders University, a LLB from the University of Alberta, a LLM from the University of Melbourne, and a DPhil in law from the University of Oxford. Paul is a Barrister and Solicitor of the Court of Queen's Bench of Alberta, Canada, and an Associate Member of the Law Society of South Australia. Paul's primary research area is legal theory, especially the nature and concept of property and the relationship between law and religion. He has published widely in both areas. Paul teaches property law, property theory, and law and religion.

David Bilchitz

David Bilchitz is a Professor at the University of Johannesburg and Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). He has also recently become the Secretary General of the International Association of Constitutional Law (IACL) for the period from April 2013–June 2014. He publishes widely in the field of constitutional and fundamental rights law and has authored the monograph *Poverty and Fundamental Rights: the Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2007). He has co-edited two books on constitutional law and business and human rights respectively, and published many book chapters and articles in journals. He has also been the guest editor of special editions for the *South African Journal on Human Rights* and *Southern African Public Law*. In 2013, David was asked to provide expert advice on the Tunisian Draft Constitution by the United Nations Development Programme and the organisation IDEA. His work is not confined to theoretical contributions but he also works actively towards social reform with his involvement in feminist, gay rights, poverty and animal rights issues in society more generally.

Edwin Cameron

Edwin Cameron has been a judge in South Africa since 1994, and a member of its highest court, the Constitutional Court, since 2009. Cameron practised at the Johannesburg Bar from 1983 to 1994. From 1986 he was a human rights lawyer based at the University of the Witwatersrand's Centre for Applied Legal Studies (CALS), where he was awarded a personal professorship in law. His practice included labour and employment law; defence of ANC fighters charged with treason; conscientious and religious objection; land tenure and forced removals; and gay and lesbian equality. From 1988 he advised the National Union of Mineworkers (South Africa) on AIDS/HIV, and helped draft and negotiate the industry's first comprehensive AIDS agreement with the Chamber of Mines. While at CALS, he drafted the Charter of Rights on AIDS and HIV, co-founded the AIDS Consortium (a national affiliation of non-governmental organisations working in AIDS), which he chaired for its first three years, and founded and was the first director of the AIDS Law Project. He oversaw the gay and lesbian movement's submissions to the Kempton Park negotiating process. This, with other work, helped secure the express inclusion of sexual orientation as a protected interest in the South African Constitution. In September 1994, he was awarded silk (senior counsel status). President Mandela appointed him an acting judge and later a judge of the High Court. In 1999–2000 he served for a year as an Acting Justice at the Constitutional Court. In 2000 he was

appointed a Judge of Appeal in the Supreme Court of Appeal. He is the author of *Witness to AIDS* (IB Tauris, 2005), and of *Justice – A Personal Account* (NB Publishers, 2014).

David Cole

David Cole is Professor of Law at Georgetown University Law Center, teaching constitutional law, national security, and criminal justice. He is a regular contributor to the *New York Review of Books*, and the legal affairs correspondent for *The Nation*. He has been published widely in law journals and the popular press, and is the author of seven books. His book, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York Press, 2004) won the American Book Award.

Colm O'Cinneide

Colm O'Cinneide is a Reader in Law at University College London, he has published extensively in the field of human rights and anti-discrimination law, and is currently the General Rapporteur of the European Committee on Social Rights of the Council of Europe. He is also currently Vice-President of the European Committee of Social Rights and a member of the Blackstone Chambers Academic Panel. Colm has served as specialist legal adviser to the Joint Committee on Human Rights of the UK Parliament and has also acted as consultant to a range of organisations, including the Northern Irish Human Rights Commission, the UK Equality and Human Rights Commission and the Irish Equality Authority.

Carolyn Evans

Carolyn Evans is Dean of Melbourne Law School and Harrison Moore Professor of Law. A graduate of Melbourne and Oxford, Carolyn is the author of *Religious Freedom under the European Court of Human Rights* (Oxford University Press, 2001), *The Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) and co-author of *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis, 2008). She is co-editor of *Religion and International Law* (Kluwer, 1999); *Mixed Blessings: Laws, Religions and Women's Rights in the Asia-Pacific Region* (Martinus Nijhoff, 2006) and *Law and Religion in Historical and Theoretical Perspective* (Cambridge University Press, 2008). She is an internationally recognised expert on religious freedom and the relationship between law and religion and has spoken on these topics in the United States, United Kingdom, Russia, China, Greece, Vietnam, India, Hong Kong, Switzerland, Malaysia, Nepal and Australia.

Tom Hickman

Tom Hickman is a practising barrister at Blackstone Chambers in which capacity he has acted in a number of significant cases, including representing AF in *AF (No 3) v Home Secretary* [2010] 2 AC 269 (fairness in control order cases), Binyam Mohamed in *R (Binyam Mohamed) v Foreign Secretary* [2010] QB 218 (public interest immunity), Mr Lumba in *Lumba (sub nom WL) (Congo) v Home Secretary* [2012] 1 AC 245 (immigration detention), Human Rights Watch and Justice in *RB & U (Algeria) v Home Secretary* [2010] 2 AC 110 (SIAC and diplomatic assurances) and pension campaigners

in *R (Bradley & Others) v Minister for Work and Pensions* [2009] QB 114 (status of Parliamentary Ombudsman reports). He also acts for central and local government. Hickman is Reader in Public Law at the UCL Faculty of Laws, with research interests in public law, human rights, national security law and constitutional theory.

Jeff King

Jeff King is a Senior Lecturer in Law at University College London. He is a member of the Bar of New York, and writes and lectures on UK and comparative public law and constitutional theory. He is the author of *Judging Social Rights* (Cambridge University Press, 2012). He is co-Editor of *Current Legal Problems*. Previously, he was a Fellow and Tutor in law at Balliol College, and CUF Lecturer for the Faculty of Law, University of Oxford (2008–11), a Research Fellow at the Centre for Socio-Legal Studies, Oxford (2008–10), and a Research Fellow and Tutor in public law at Keble College, Oxford (2007–08). He studied philosophy at the University of Ottawa and law at McGill University before working as an attorney at Sullivan & Cromwell LLP in New York City (2003–04). He then completed a doctorate on welfare rights adjudication in English public law at Keble College, University of Oxford.

Shiri Krebs

Shiri Krebs is the Christiana Shi Fellow in International Studies, Stanford University, and the Law and Security Fellow, Stanford Center on International Security and Cooperation. She teaches international criminal law and international humanitarian law at Santa Clara University Law School, while writing her doctoral dissertation at Stanford Law School. Her research focuses on the impact of legal institutions on public perception of facts during armed conflicts.

James Krumrey-Quinn

James Krumrey-Quinn is a legal research assistant with the Adelaide Law School, University of Adelaide. James holds an LLB (with 1st class Hons), BCom (Corporate Finance) and Diploma in Languages (Italian) from the University of Adelaide, and a Graduate Diploma in Legal Practice from the Australian National University. James is a lawyer of the New South Wales Supreme Court and is a member of the Criminal Bar Association, the Bar Human Rights Committee and the Constitutional and Administrative Law Bar Association in the UK. James's research interests include law and religion, access to justice and the criminal law, access to sustainable energy and the law, and international law and the use of force.

Adam Tomkins

Adam Tomkins holds the John Millar Chair of Public Law at the University of Glasgow School of Law, having previously taught at St Catherine's College, University of Oxford (2000–03) and at King's College London (1991–2000). He specialises in constitutional law and has research interests in British, EU and comparative constitutional law, as well as in aspects of constitutional theory and constitutional history. In 2009 he was appointed a legal adviser to the House of Lords Select Committee on the Constitution.

Anashri Pillay

Anashri Pillay is a Lecturer in Law at Durham University, where she teaches international law and international human rights law. Her research interests lie in the field of comparative constitutional law, particularly the adjudication of economic and social rights by national courts. Anashri has published a number of articles on, amongst other things, principles of judicial restraint; adjudication of economic and social rights; and judicial review for unreasonableness. She is a member of the Economic and Social Rights Research Network (ESRAN-UKI) and the African Network of Constitutional Lawyers (ANCL).

Johan van der Vyver

Johan D van der Vyver is the IT Cohen Professor of International Law and Human Rights in the School of Law of Emory University in Atlanta, Georgia and an Extraordinary Professor in the Department of Private Law of the University of Pretoria. He was formerly a Professor of Law at the University of the Witwatersrand, Johannesburg and the Potchefstroom University for Christian Higher Education in South Africa. He is the author of 11 books and monographs and close to 300 chapters in books, law reviews and other articles, and book reviews. His research interests and publications include human rights, international criminal law and a great variety of other subject-matters.

Stephen I Vladeck

Stephen I Vladeck is a Professor of Law and the Associate Dean for Scholarship at American University Washington College of Law. His teaching and research focus on federal jurisdiction, constitutional law, national security law, and international criminal law. A nationally recognised expert on the role of the federal courts in the war on terrorism, he was part of the legal team that successfully challenged the Bush Administration's use of military tribunals at Guantánamo Bay, Cuba, in *Hamdan v Rumsfeld*, 548 US 557 (2006), and has co-authored party and amicus briefs in a host of other major lawsuits, many of which have challenged the US government's surveillance and detention of terrorism suspects.

Jochen von Bernstorff

Jochen von Bernstorff holds the chair for constitutional law, international law and human rights at the Eberhard Karls Universität Tübingen (since 2011). He studied law at Philipps-Universität Marburg and University of Poitiers, received his PhD from the University of Mannheim in 2000 and holds an LLM from the European University Institute (EUI) in Florence (2001). He was with the German Federal Foreign Office (diplomatic service 2002–07) in the Multilateral Human Rights Policy Task Force of the UN, a member of the German delegation at the UN Commission on Human Rights in 2004 and 2005 and the UN Human Rights Council in 2006, and a member of the German delegation at the UN General Assembly in 2003–05. Furthermore, he served as chief negotiator of the German delegation at negotiations over the UN Convention on the Rights of Persons with Disabilities, New York (2003–07). From 2007 to 2011 he was a senior research fellow at the Max-Planck-Institute for Comparative Public Law and Public International Law in Heidelberg. His main areas of research are in international and

comparative human rights law as well as history and theory of international law. He is the author of the monograph *The International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press, 2010).

Paul Yowell

Paul Yowell has been Fellow and Tutor in Law at Oriel College, Oxford since 2012. Prior to that he was Lecturer in Law at New College, and a post-doctoral fellow with the Oxford Law Faculty for the AHRC project Parliaments and Human Rights. His main areas of research are in constitutional and legal theory, comparative constitutional law, and human rights. At Oxford he teaches Constitutional Law, EU Law, Jurisprudence and Human Rights.

Table of Cases

A v B [2009] UKSC 12, [2010] 2 AC 1.....	119, 124–25
A v Minister of Defense (ADA 7/88), 42(3) PD 133 (1988)	192
A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68 ...	164
A v Secretary of State for the Home Department (No 2) [2005] UKHL 71, [2006] 2 AC 221.....	128–29
A v State of Israel (ADA 7750/08), unreported (2008)	193
A v State of Israel (CrimA 6659/06) (2008) 47 ILM 768	189–90
A v United Kingdom (App no 25599/94), unreported (23 September 1998)	250
A v United Kingdom (App no 3455/05) (2009) 49 EHRR 29....	122–25, 130, 169, 173, 197
A obo V and A v Department of School Education [1999] NSWADT 120.....	262
Abbott v Burke (Abbott XIV), 185 NJ 612 (2005)	367–68, 371
Abbott v Burke (Abbott XXI), No M–1293–09, (NJ May 24 2011)	367–68, 371–72
Aberah v Military Commander in the West Bank (HCJ 317/13), unreported (2013)	195–97
Aboriginal Legal Rights Movement Inc v South Australia (No 1) (1995) 64 SASR 551.....	266
Abu-Sneina v Military Court of Appeals (HCJ 2021/10) unreported (8 April 2010).....	179
Adalah Legal Center for Arab Minority Rights in Israel v GOC Central Command (HCJ 3799/02) (2006) 45 ILM 491	186
Adams v Richardson, 351 F Supp 636 (DC Cir 1972)	360
Adarand Constructors Inc v Peña, 515 US 200 (1995)	98
Additional District Magistrate, Jabalpur v SS Shukla, 1976 SCR 172	343–44
Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (1943) 67 CLR 116	261
Adelaide Corporation v Corneloup (2011) 110 SASR 334	261
Agbar v IDF Commander in Judea and Samaria (HCJ 9441/07), unreported (2007)	191
Ahmet Arslan v Turkey (App no 41135/98), unreported (23 February 2010)	212
Airey v Ireland (A/32) (1979) 2 EHRR 305	306, 359
Aitken v Victoria [2013] VSCA 28.....	271–73
AK Gopalan v State of Madras (Union of India: Intervener), 1950 SCR 88	344
Al Odah v United States, 346 F Supp 2d 1 (DDC 2004)	165
Al Odah v United States 559 F 3d 539 (DC Cir 2009)	130, 165
Al Odah v United States, 608 F Supp 2d 42 (DDC 2009)	165
Al Rawi v Security Service [2011] UKSC 34, [2012] 1 AC 531	120, 126, 128, 133, 135, 170, 175, 205
Al-Amudi v State of Israel (ADA 6409/10), unreported (2010)	194
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567	38, 48, 54–55, 57–58, 81–82
Al-Ghabra v HM Treasury [2010] UKSC 2, [2010] 2 AC 534.....	124

Additional Protocol on Collective Complaints 1996	306
American Convention on Human Rights 1969	
Art 26	300
San Salvador Protocol	300
International Covenant on Civil and Political Rights 1966	17, 184-85, 284
art 4	185
(1)	185
art 9	185
art 12(3)	277
art 18	265-66
(4)	273
International Covenant on Economic, Social and Cultural Rights 1966	300, 302
Optional Protocol	306
Universal Declaration of Human Rights 1948	17, 284

Part 1

Introduction

The Pluralism of Human Rights Adjudication

CHRISTOPHER MCCRUDDEN

THIS BOOK IS primarily about judicial reasoning in 'human rights' cases. 'Human rights', we should note from the outset, includes both the application of international human rights at the domestic level, and what some jurisdictions include under an idea of domestic 'constitutional rights'. Are there techniques that courts share, or are different techniques adopted, to decide how human rights, in this broader sense, are protected? The book aims to adopt a comparative approach to the examination of this reasoning, through a detailed examination of similar human rights issues in a range of jurisdictions. The aim of the book, then, is to examine the similarities and divergences in the reasoning developed by courts when addressing comparable human rights questions. The book shows that human rights reasoning involves distinctive and particular forms of legal reasoning, but that its form and content differ significantly from jurisdiction to jurisdiction, and over time within jurisdictions. Building upon these findings, we explore what these similarities and differences tell us about the nature, and the direction of travel, of human rights law which comprises notionally *universal* norms. The editors of the book debated whether to call it, *Adjudicating Human Rights Diversely*, which is a good indication of the major theme.

I. METHOD AND SCOPE

A. Differing Scholarly Approaches

Broadly, in examining these issues the contributors have adopted at least one, and usually more than one, of four methods.¹ All are concerned, at least to some extent, with exploring the understanding and internal coherence of legal concepts and legal reasoning: how legal concepts fit together, the consistency of the use of concepts in different areas of law, and the extent to which general principles can be extracted from legal reasoning that can be used to predict or guide future legal decision-making. Second, some (particularly those contributors in the section dealing with proportionality) are explicitly concerned with the meaning of human rights *law*: examining what, if anything,

¹ Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *LQR* 632–50.

makes human rights law different from, or similar to, other normative systems, such as politics, morality and ethics. Third, several of the contributors (perhaps particularly those in the Parts of the book dealing with religion and national security) explicitly seek to examine the ethical and political acceptability of human rights delivered through legal instruments: the consideration of issues such as whether specific legal interventions are acceptable when assessed against external moral, ethical or political principles, or what should be the appropriate legal response where none exists at the moment. Policy prescription is thus often encountered, sometimes addressed to the courts, sometimes to policy-makers in government. Fourth, several contributors (particularly in the chapters by Jeff King and by Shiri Krebs²) are concerned with the *effect* of human rights law: what effect, if any, does human rights law have on human behaviour, attitudes, and actions? How does it have these effects? Are some institutional mechanisms for delivering legal outcomes more effective than others? Each of these four approaches is significantly situated in one or more domestic or regional legal contexts, but all adopt an additional explicitly comparative perspective.

B. Why Compare?

The contributors concentrate on taking a comparative approach to human rights rather than emphasising international human rights protections as such, although there is significant discussion of approaches to human rights under the European Convention on Human Rights because that approach now underpins the jurisprudence of several of the European jurisdictions considered. The countries considered from time to time include (in no particular order): the United Kingdom, Germany, Israel, the United States, Canada, South Africa, Australia, and India. Often underlying the comparison is 'a United States versus "the others"' contrast, hinting at the origins of the book in a conference that was more explicitly a comparison with the United States.

We shall consider in a moment the implications of undertaking a comparative approach, but one difficulty must be acknowledged at the beginning of this discussion. We are sensitive to the criticism that our comparison is limited to the same few favoured jurisdictions that are often drawn upon in the study of comparative human rights law, and that to attempt explanations of the general human rights phenomenon based on the experience of these few states is therefore problematic.³ Although in general this criticism raises a valid concern, in the context of this book it appears to us not to be so challenging. The jurisdictions concerned, importantly, share a set of relatively similar public values, such as a basically liberal perspective, a commitment to such values as the rule of law, separation of powers, and considerable experience of borrowing from each other. To the extent that these jurisdictions in particular differ significantly in their understanding of human rights, therefore, the more significant those differences become and the more they need to be explained.

² Chapters eighteen and nine respectively. Unless otherwise indicated by a footnote reference, the authors referred to in this chapter have contributed chapters to this book, and it is these chapters to which reference is being made.

³ See Ran Hirschl, 'From comparative constitutional law to comparative constitutional studies' (2013) 11 *International Journal of Constitutional Law* 1–12 on problems with case selection.

The issue of jurisdictional selection aside, why is a comparative approach justified, and why in the context of human rights in particular? The contributors advance several different justifications for adopting a comparative approach. One common rationale for comparative law is that it is a useful tool in liberal legal reform. The aim of comparative law is to identify better legal solutions to legal problems in foreign legal systems and then to recommend their incorporation into domestic law through a process of harmonising upwards. We will return to this rationale later, but we can note that this rationale is particularly popular in the context of human rights. Carolyn Evans (in chapter eleven) describes how the use of comparative law reasoning plays an important role in the politics of human rights, where changes in one country are used to leverage change in a similar direction in another country. Comparative experience is often heavily drawn on as a source of inspiration for law reform initiatives by the legislature, particularly in Europe and the Commonwealth.

We see, too, that there is a highly significant variation on this approach, where judges, particularly those in constitutional courts or their equivalents, increasingly draw on interpretations by judges in other jurisdictions for guidance and for support. Here, comparative analysis is used not just to generate policy arguments, but as a basis for legal argument. For example, David Cole and Stephen Vladeck (in chapter eight) argue, in the context of national security cases, that where comparison demonstrates that each country can do more to secure open justice, human rights law requires them to in order to improve fairness without undermining national security. We shall return to this issue subsequently in this Introduction.

We should also note, however, that borrowing is a controversial method of law reform, for reasons that several contributors identify. In the first place, a transplant may prove inappropriate because of the different social and economic structures of the two societies in question; this is perhaps of most significance in the discussion in this book of contrasting approaches to the delivery of socio-economic rights. A second objection is that legal concepts in particular jurisdictions are often closely connected with other concepts and institutional practices; transplanting a concept from one jurisdiction to another without the other concepts and institutions with which it is connected in the 'sending' jurisdiction risks causing unintended consequences. Krebs, for example, points to the dangers of comparative law borrowing, in which recommendations are made to borrow from another system without fully realising the way in which the recommended system operates in practice – where borrowing the rhetoric without understanding the practice can lead to unintended consequences. Nor is the assumption that is sometimes made by human rights activists that comparative approaches will lead to *liberal* reforms, necessarily borne out in practice. Tom Hickman and Adam Tomkins (in chapter seven) provide a dramatic reconstruction of how a clash of approaches between the United Kingdom and the United States on how to deal with secret evidence led to a political and legal conflict, and how the United Kingdom approach was eventually abandoned under political pressure from the United States. In this case, comparison led to levelling down rather than levelling up.

A second rationale for comparative law is also apparent in the contributions that follow. This rationale sees the benefit of comparative law as the paradoxical objective of understanding one's own domestic legal system better.⁴ The comparative lawyer seeks,

⁴ L. Lazarus, *Contrasting Prisoners' Rights* (Oxford, OUP, 2004) 19–20.

through a close analysis of the doctrines of foreign law governing a particular topic, to improve his or her appreciation of the logic of the concepts and rules of the domestic legal system in connection with that chosen topic. Evans, for example, suggests that the potential utility of scholarly comparative analysis lies in assisting in the development of a more comprehensive explanatory framework of the various options available than an examination of just one jurisdiction would provide. One example of this is provided by Jeff King, whose comparative analysis provides significant insights into empirical claims that sometimes accompany arguments about the consequences of taking certain positions on socio-economic rights. Another example is provided by Krebs, who explores empirically the different methods used to handle secret evidence in the national security context. She throws light particularly on how different jurisdictions approach the appropriate role for judicial decision-making with remarkably different presuppositions. In other words, contributors seek 'through juxtaposition, to uncover the "strangeness in the familiar" and thereby to gain insights into the domestic legal environment they are asked to describe and evaluate.'³

Comparative legal analysis often takes place on the assumption that the jurisdictions being compared are operating in separate spheres. In the human rights context, however, courts in different jurisdictions are much more frequently operating in very similar, often overlapping, legal spheres, which brings us to a third important rationale. Sharing overlapping legal space (*'espace juridique'*) means that the courts are, to some extent, in competition with each other: human rights lawyers, of course, now make strategic choices as to which legal system to take their case in; the saga of how to deal with torture allegations involving United States personnel, as described by Hickman and Tomkins (in chapter seven), is a classic instance of this. They discuss the transnational human rights litigation, in which the domestic courts of the United States and the United Kingdom were brought into a dispute over access to secret information in the context of the American extraordinary rendition programme. Operating in the same legal space, leading to a degree of judicial dialogue across different jurisdictions, illustrates the clash of legal cultures over disclosure of information relating to the operation of the intelligence services.

Competition goes beyond forum shopping. If, as we shall see, there are ideological differences between the courts on human rights issues, then the competition between the courts is essentially about the use of soft power between the states in which the courts are situated. We have for some time observed a developing global 'market' in liberal ideologies, where states compete with each other to try to influence how far their own particular liberalism defeats competing liberalisms. The locus of where the competition takes place has shifted somewhat from politics and economics, to encompass judicial institutions as well, in particular through emerging judicial approaches to constitutional or human rights. The way that national and regional courts decide what lawyers think of as constitutional or human rights claims has now become part of the global market in liberalisms. A comparative approach makes clear what is at stake in this competition.

Comparative legal analysis is important, also somewhat paradoxically, for a fourth reason: to understand better the developing content and implications of international human rights law. This is the case because of two particular features of international human rights law, and its relationship with domestic law. First, there is a proliferation

³ *ibid.*, 20.

of international standards on human rights, but a comparatively weak set of enforcement mechanisms available to put these norms into operation at the international level. It is clearly envisaged that the first port of call, as it were, for effective implementation of these international norms is to be at the domestic level. Several human rights treaties require the state that has ratified the treaty to implement it effectively in the country's domestic law. And even where human rights treaties provide for independent supervisory mechanisms and procedures for ruling on complaints, as a general rule those complaining must have exhausted domestic remedies before being able to complain successfully.

Courts in the jurisdictions discussed in this book do, occasionally, have recourse to international law in that sense in human rights cases. Hickman and Tomkins point to US courts considering international law in issues to do with the clash between national security and due process, and Colm O'Connell considers international human rights standards to be central to the discussion of social rights. There is extensive use of the ECHR at the domestic level and, of course, before the European Court of Human Rights itself. But the use of international human rights law, other than the ECHR is exceptional rather than commonplace. The human rights work is being done primarily before domestic and European regional courts, using primarily domestic legal sources. In short, much of the work of interpreting and applying human rights norms takes place at the domestic level, in significant measure in domestic courts. There is a notable absence in most of the contributions of any significant reference to litigation before international tribunals.

The second feature of international human rights law that emphasises the importance of comparative human rights is the role that domestic jurisprudence plays in the evolution of international norms. This is the case in particular in the development of customary international law, where the domestic courts may contribute to the 'state practice' that plays such a significant part in the definition of customary international law. It is also the case in the context of the interpretation of international human rights treaty law by international tribunals, given the increasing importance attached to domestic jurisprudence in assisting international tribunals to arrive at an interpretation of the international standards. In this context, international tribunals are acting in much the same way as some domestic constitutional courts interpreting domestic constitutions, where the jurisprudence of other courts is regarded as informing the approach adopted.

States interested in the development of international law will, therefore, want to be aware of the decisions of influential domestic courts because they may well end up being incorporated into customary international law, or become accepted interpretations of the international treaty law that applies to them. The United States is, for example, bound by international law. Seen from this perspective, the relevance of any differences between courts becomes somewhat more significant. The European Court of Human Rights is clearly influential beyond Europe in the development of the interpretation of international human rights law. It plays a role in establishing the international law by which the US Supreme Court is itself judged. Potentially, therefore, where the judgments of the European Court of Human Rights, based in part on the jurisprudence of domestic courts of contracting states, differ from those of the US Supreme Court, the issue becomes one of the extent to which differences between these courts may indicate that the US Supreme Court's decisions fail to live up to international human rights law obligations.

Understanding human rights law at a theoretical level may also be informed by a comparative understanding. This concern forms the fifth justification for the adoption of a comparative approach. In his contribution (in chapter two), Kai Möller distinguishes between two different approaches to comparative law scholarship that may inform this theoretical understanding. Comparison may involve engaging in the comparative analysis of the *history and application* of certain concepts and doctrines in different jurisdictions, which he characterises as involving an examination of the history of ideas. In contrast, comparison may be based on a view that there is a global conversation about rights, and the purpose of comparison is how *best* to understand and adjudicate them; here, comparative study is directed at learning the normatively best way to take rights seriously. To the extent that law is a 'way that a society makes sense of things', we may be able to use the way in which different countries treat a particular issue, as a way of peering into the cultural underpinnings of both our own, and other countries' approaches to human rights.

An important problem arises in how to do comparative legal analysis of human rights cases in order to inform a deeper theoretical understanding of the nature of human rights: how far does one abstract from the detail of each particular jurisdiction in order to identify commonalities and differences? A characteristic of scholarship attempting to use comparative analysis to inform theoretical approaches in this way is the prevalence of attempts to develop 'models' which capture alternative ways of doing things. Krebs develops models of contrasting ways to address the problem of clashes between secrecy of intelligence material and due process rights. Christopher McCrudden and Brett Scharffs (in chapter ten) develop models of how to deal with the relationship between freedom of religion and liberal government. Murray Wesson (in chapter fourteen) adopts the model developed by Mark Tushnet distinguishing between courts that take a more prescriptive approach to rights (strong rights) and courts that take a more deferential approach (weak rights).⁶ There is frequent reference to Möller's model of rights as an important part of global constitutionalism.⁷ But all these models are contestable when the sheer complexity of the practice in any particular area of human rights adjudication is understood, and the danger of essentialising and overly simplifying to the degree that the models are misleading is ever present. A good example is provided by O'Connell's challenge (in chapter fifteen) to the utility of Tushnet's weak rights/strong rights distinction as failing to capture the complexity of existing practice in the adjudication of socio-economic rights.

C. What do We Mean by 'Human Rights Adjudication'?

We have chosen to examine the phenomenon of 'human rights adjudication' in this book, but what exactly does this mean? One of the main difficulties in approaching the question we identified as our central question, and doing so comparatively, is that what we mean by 'human rights adjudication' is problematic because it might comprise a range of related but distinct phenomena in different jurisdictions. We need to have an understanding of what we mean by human rights adjudication if we are to compare like with like.

⁶ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton NJ, Princeton University Press, 2009).

⁷ Kai Möller, *The Global Model of Constitutional Rights* (Oxford, OUP, 2012).

First, focusing on courts' adjudication of human rights issues gives rise to a series of questions. What, exactly, is a 'court' and how do we go about comparing their activities in the human rights context? Typically, four areas of comparison and contrast can be distinguished: the Court's structure and composition; its location within the political system; its procedural characteristics, and its deliberative performance.

The first area of comparison is well illustrated by Anshri Pillay who argues (in chapter seventeen), for example, that we need to be conscious of the structure of the Indian Supreme Court in understanding the results of litigation. In particular, she suggests how relaxed standing requirements, the high volume of litigation, the common use of two-judge divisions rather than the court sitting en banc, all contribute to the inconsistency of approach which she finds in her analysis of the Indian Supreme Court's dealings with socio-economic rights.

As regards the second complexity, although several of the contributors contrast decisions of the European Court of Human Rights and the United States Supreme Court, we need to be conscious that although they are both clearly courts, they are also significantly different. The European Court of Human Rights is, and considers itself to be, an international human rights court, whose main function is to resolve individual disputes between individuals and states over the treatment of individuals; the primary focus is on the relationship between the citizen and the state. The Court of Human Rights is not a constitutional court, in the sense of addressing also issues of federalism or the separation of powers, except in this restricted area. In contrast, the US Supreme Court is not an international court. The Supreme Court is, and considers itself to be, a constitutional court. This means that it considers its principal function to be not the protection of human rights as such, but rather the construction and organisation of a system of democratic government. Human rights are part of that system, but are not the whole of that system. We should not exaggerate these differences; nor should we minimise them.

The third area of comparison is also worth mentioning at this point. The procedural characteristics of litigation are often crucial in practice. It is particularly in the context of discussions of socio-economic rights that attention is increasingly given to the institutional considerations in play: issues of accessibility of the court, evidence, remedies, all affect the likelihood that human rights issues will get to court in the first place, and therefore the opportunity of courts to deal with a human rights question in the first place. King and Edwin Cameron (in chapters eighteen and sixteen respectively) emphasise the importance in both South Africa and the United States of activity by non-governmental organisations in appreciating differences between the two countries in how litigation is initiated. So too, differing approaches to what evidence is allowed and how it is presented may be crucial in explaining different outcomes. As King argues, these differences affect significantly the extent to which substantive legal approaches developed in one jurisdiction are applicable to other jurisdictions, and thus the potential for appropriate comparison (let alone borrowing between these systems).

The emphasis in this book is on the fourth area of comparison, and we shall have much to say on that issue below, but an initial difficulty in comparing courts in this respect can be observed at this stage. There are very different *styles* of judicial opinion on display in the decisions of human rights courts. We can distinguish a more personal, grand style of reason-giving by courts from a more impersonal formal style.⁸ The United

⁸ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Buffalo NY, Hein Publishing, 1996 [1960]).

States Supreme Court is essentially a common law court, in the sense that it regards the interpretative and developmental role of judges as central, whereas the European Court of Human Rights is poised between being a common law court and a court in the tradition of the civil law, which downplays the centrality of judicial 'interpretation'. There is much to ponder on here, but we can point to the highly personal tone of the Supreme Court's opinions versus the rather more austere, even formalistic approach of the Court of Human Rights' opinions as one likely result of the different origins and composition of the courts. Again, we should not overestimate the differences but their different origins go some way to explaining some of the differences in judicial style and behaviour that we identify subsequently. In order to explore these issues, we have adopted a broad understanding of the different institutions involved in 'adjudicating' human rights.

We also consider it important to capture a fuller range of legal methods giving rise to litigation concerning human rights. We have, therefore, also taken a broad, rather than a narrow understanding of 'human rights'. As we pointed out in the introduction to this chapter, by 'human rights' we mean to include issues that include but also go beyond international human rights law.

We therefore include, for example, what would traditionally be considered to arise in rights litigation under domestic constitutional law, but in this too we adopt a broad understanding, in two respects. First, there are significant variations between jurisdictions that share a constitutional tradition of judicial protection of human rights, and even those jurisdictions that adopt a heavily constitutional and judicial approach to rights protections draw the line differently; there is a significant theoretical difference between the German Basic Law's adoption of unamendable constitutional provisions, and the United States' adoption of (at least theoretically) amendable constitutional protections.

Nor do we restrict ourselves to litigation challenging legislation – judicial review in its strongest sense. We include within the scope of human rights litigation several different ways of giving effect to human rights values. Paul Babie and James Krumrey-Quinn identify different ways of giving effect to Bills of Rights provisions (in chapter thirteen): (a) reading down statutory provisions so as to render them compatible with the Bill of Rights – Babie and Krumrey-Quinn draw attention to the indirect effect of Bills of Rights on ordinary statutory interpretation; Krebs discusses in the Israeli context the technique of interpreting the legislation, even against the plain meaning of the legislation, to conform to the required standard, instead of striking down the contested provision; (b) declarations of inconsistency of legislation without rendering a provision invalid, as well as (c) adjudicating actions brought directly against public authorities – an independent cause of action. Pillay (in chapter seventeen) points to the importance of the Indian Directive Principles in providing a resource for the expansive interpretation of the more narrowly framed justiciable fundamental rights. Jochen von Bernstorff (in chapter four) distinguishes adjudication of individual complaints regarding the application of legislation by the Executive Branch, from reviewing legislation for conformity with human rights standards (note the similar distinction in the UK Human Rights Act).

We do not restrict our conception of human rights litigation at the domestic level only to constitutional litigation involving claims under Bills of Rights in written constitutions because the extent to which human rights are recognised and guaranteed through constitutional law in one jurisdiction might (and does) differ significantly from other jurisdictions. Most recently, comparative human rights analysis has been carried out primarily as a branch of comparative constitutional law. We consider it important to get beyond

this now traditional focus on simply describing constitutional methods of protection. Jurisdictions differ in the way they divide human rights issues between different types of domestic legal regimes, with some jurisdictions tackling human rights issues through administrative law, private common law, or ordinary legislation specifically addressing a particular human rights problem, rather than through constitutional provisions. Of the jurisdictions discussed, Australia is now the best example of a jurisdiction which has no (federal) Bill of Rights and deals with human rights through a patchwork of legislative and common law methods, combined with the use of a limited range of long-standing constitutional principles like separation of powers. Merely because a particular jurisdiction does not possess American- or German-style constitutional judicial review does not mean that there are no legal remedies available. These differences do matter in terms of the approach to judicial reasoning that is adopted. It is clearly the case that the interpretative approaches to constitutional texts sometimes differ significantly from the interpretation of ordinary legislation, for example.

We adopt a broadly functional rather than a conceptual analysis of human rights litigation. The importance of this more expansive approach to what we consider human rights litigation is most apparent in the discussion of socio-economic rights. We include jurisdictions that explicitly provide for socio-economic rights as such in their constitution (South Africa), jurisdictions that protect socio-economic rights through expanded interpretation of civil and political rights (O'Connell provides examples, such as the right to equality, or the right to life), jurisdictions that protect socio-economic rights by way of ordinary legislation, and jurisdictions that protect important elements of socio-economic rights through the use of administrative law controls. King, in particular, shows the different ways in which the United States has advanced socio-economic rights not through constitutionalising socio-economic rights in a text but by the use of other methods, such as through the interpretation of equality, through the application of administrative due process rights in welfare benefit decision-making, in providing rights to prisoners for state-funded medical assistance, and in forms of statutory interpretation that are generous towards those claiming public resources. We do this because we consider that one of the important questions to be considered is what difference it makes to adjudication which way rights are protected.

II. THE ADJUDICATORY PLURALISM OF HUMAN RIGHTS

By examining human rights law comparatively, we suggest that we can see better what human rights law involves at a deeper level. From this perspective, building from the contributions of those in this book, we can say that human rights law appears to be radically pluralistic, in the substantive understanding of how particular rights apply, in what 'human rights' means as a conceptual category, and in the structure of reasoning that courts adopt in addressing these issues.

A. Substantive Diversity in Human Rights Adjudication

The diversity of human rights law relates, first, to the substance of the human rights decisions reached. Here are some of the ways this diversity can be identified in the contributions that follow.

First, what is a human right? This question turns out to be more problematic than might first appear to be the case. If we were to focus on gross and crude violations of human rights, such as torture, genocide, ethnic cleansing, mass rapes, and so on, then the definition of what constitutes a human right (and human rights *law*) is fairly unproblematic. Like the approach to the definition of obscenity that says 'I can't define it, but I know it when I see it', we can agree that genocide is a violation of human rights without any very sophisticated reasoning or justification being necessary. What we should do about it, when international intervention is justified, for example, or whether there should be an international criminal court are real issues. But that genocide is a violation of human rights norms is now an uncontroversial proposition. In other contexts, however, not having a common conception of what human rights are can lead to real differences. In certain contexts, not all, but certainly some, there will be a theoretically related dispute about what we mean by the concept of a human right, particularly given the emotional force which an allegation of a violation of human rights now has in many countries.

Secondly, who or what can be a right-holder? Must it be an individual or can a group or a corporation be a rights claimant? We can see contrasting conceptions of human rights, individual rights versus institutional group rights, in the contribution by Babie and Krumrey-Quinn, which considers the rights of religious institutions to exercise internal powers without interference. We commonly come across similar controversies in several other situations. In abortion, the issue is raised in the context of what some have claimed as a 'right to life'. Can a foetus be a right-holder? Where someone is in a permanent vegetative state, do they remain 'human', and are they right-holders? Are human rights necessarily individualistic? Do human rights attach to everyone within a particular territory, or are they restricted to those who qualify according to some other status, such as citizens, or men? In other contexts, such as the issue of minority rights, we have to consider whether groups can have rights as such. Or does the idea of group rights, or collective rights – rights that are held by the group or the collective – run counter to a basic element in an acceptable concept of human rights, namely that human rights must necessarily be individualistic, and reducible to individual rights? This dispute, as Michael Freeman has noted: 'raises theoretical questions of who can have human rights. Such an analysis in turn raises . . . questions of which relevant entities exist, what properties they have, and which properties are necessary and sufficient conditions for having human rights'.⁸

Thirdly, who are the addressees of human rights? Human rights organisations like Amnesty International have been faced with the question of to what extent groups other than governments (such as terrorist organisations, or corporations) should be regarded as capable of being in violation of human rights. Do human rights norms address states and governments only, or do they address everyone, including private actors? Are human rights held against the state, or held against all? There is a fundamental tension between regarding the state as the main problem (the state as oppressor), and regarding the state as part of the solution (the state as protector).¹⁰ The United States Bill of Rights has a relatively restricted view of constitutionally protected human rights; they are rights

⁸ Michael Freeman, 'The Philosophical Foundations of Human Rights' (1994) 16 *Human Rights Quarterly* 491, 494.

¹⁰ I. Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce' in Julian Roberts and Lucia Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Oxford, OUP, 2012).

against the state,¹¹ not against all, but in other jurisdictions, such as South Africa, the position is often less clear-cut, as Babie and Krumrey-Quinn consider in the context of a discussion of the constitutional right to be free from discrimination.

This question of which approach is the appropriate 'human rights' approach becomes even more contested when we include the vexed issue of the role that positive obligations play in current understandings of human rights. As we shall see, for example in the contribution by Babie and Krumrey-Quinn, the distinction is sometimes made between negative rights (such as the typical civil liberty of freedom of expression) and positive rights (such as the typical socio-economic right to basic health care), although Cameron regards the distinction as 'misleading' and too crude to capture the legal practice. This is a particularly pressing issue in the socio-economic rights context, where the distinction often features, with positive rights often being adopted because of concerns to ensure greater access to distributive justice. Yet, as King shows, the United States Supreme Court opted for an interpretation of the US Bill of Rights that for the most part famously comprises negative but not positive rights.

Fourthly, are 'human rights' greater than simply the sum of its parts, or are 'human rights' just a ragbag collection of separate unconnected rights? Is 'human rights' a banner signifying a common moral urgency based on some shared normative principle, or just a flag of convenience? And, to bring the issue back to the narrower concerns of this book, is the adjudication of each right in issue essentially *sui generis* in terms of the approach taken? Can we accurately speak about 'the' approach to human rights adjudication? There is an important emerging human rights scholarship that seeks to find the underlying unity of human rights adjudication in the widespread use of proportionality. Möller and Yowell, among others, argue that the jurisdictions discussed appear to share a strong common approach in subjecting *prima facie* breaches of human rights to a proportionality analysis. On the other hand, we have clear examples where the courts do not subject some important rights to proportionality, such as the right to be free from torture. Carolyn Evans notes how legislatures and courts may adopt a 'portfolio' approach, adopting different strategies in different contexts, even where these different approaches seem inconsistent with each other. She argues that legal systems will probably continue to shift somewhat uneasily between approaches. And Pillay's analysis of the Indian case law discloses, as Wesson says, a 'radical inconsistency' not only in terms of the differing approaches taken to different rights, but how these approach differ over time concerning the same right.

Fifthly, are human rights to be understood in universal or context-specific terms? The strong ideology of human rights is that they are universal in their significance; they are not rooted in any particular region of the globe, but appeal across cultures. Yet, at the same time, as O'Connell argues, and as is clearly on display in the subsequent chapters, different jurisdictions have very different 'boundary conditions' that limit the extent to which rights can be legally enforced in any given jurisdiction. (He shows how these boundary conditions will structure how social rights are adjudicated, interpreted and enforced, but his argument is of significance across the range of rights). Different contributors give examples of how differing boundary conditions contribute to divergence in rights interpretation and enforcement, such as the different institutional contexts in

¹¹ The question of whether they are rights against State governments as well as against the federal government was for long a contentious question.

which litigation emerges giving rise to different types of litigation. We have already observed that Pillay describes how important the institutional context of Indian litigation is, with the role of public interest or social action litigation being dependent on organised non-governmental organisations. O'Connell himself identifies differences in textual and doctrinal starting points ('text matters'), differences in the sources of judicial authority, and differences in the nature of the constitutional culture as important factors, the latter being well illustrated by the contrasting approaches taken to human rights adjudication in jurisdictions with transformative and conservative Bills of Rights, as Wesson discusses. King and Cameron identify how different courts construct their approach to social rights adjudication (and in particular how interventionist to be) in part based on the responsiveness of the other branches of government.

Perhaps the most important 'boundary condition' relates to the differing historical conditions of different jurisdictions. All of the courts discussed are engaged in a delicate balance of relying on and, at the same time, constructing a political identity in their jurisdictions through their interpretation of human rights standards. But whilst constructing these identities, each court requires a degree of *already existing* common constitutional identity from which to build, in order to provide the basis for its most difficult decisions. This tension between identifying what is an already existing identity and the creation of a new identity for different times has been something that courts have confronted over the course of their history. As we read the chapters in this book, we see how frequently differences in history between different countries help to explain why there are differences in human rights policy, or why institutions behave differently on some human rights issues. One obvious example is the United States, where the history of constitutional judicial review between the 1900s and the 1930s, beginning with *Lochner* (1905),¹² and ending with the Court's acceptance of the New Deal's radical expansion of the interstate commerce clause,¹³ has continuing significance, as Yowell discusses (in chapter five).

But we are left with a dilemma. While we need to have an understanding of history to appreciate what is going on, to what extent is history considered to be a *justification* for the approach adopted? The answer to that question throws us back to the issue of universalism versus cultural relativism. If courts accept the former, then history has a much less certain role as a justification, as opposed to simply being an explanation. (The much more restrictive approach adopted in Germany to the expression of racial hatred in public is explained in large part by reaction against Germany's history of anti-semitism, but does that history justify these greater restrictions?) But if courts accept the latter, then history may be both an explanation and a kind of justification. The use of the meta-principle of human dignity may provide an example of this. Cameron identifies the close relationship between socio-economic rights and the concept of human dignity (an apparently highly universalistic concept) but at the same time explains how dignity is a flexible, context-specific concept: 'what is required to live in dignity differs widely in different contexts'.

Finally, what are the circumstances in which a human right can be successfully overridden? Are human rights in general properly to be considered to be rules with a deontic character (as in Dworkin's original 'rights as trumps' analysis¹⁴), or should human rights be thought of, in a particularly influential alternative way of thinking about them, as

¹² *Lochner v New York*, 198 US 45 (1905) (United States).

¹³ Culminating in *Wickard v Filburn*, 317 US 111 (1942) (United States).

¹⁴ Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA, Harvard University Press, 1978).

'optimization requirements' (Alexy's analysis of constitutional rights¹⁵). Here too, the contributors identify radically diverging approaches being adopted by courts. The issue comes to the fore particularly in those contexts where conflicts arise between one right and another right, for example between the right to freedom of religion and the right to freedom from discrimination, or where there is a conflict between the right to life and the right to due process. Where there is an apparent conflict of rights, should we accept some hierarchy of rights, with some rights being more important than others? Some have suggested, for example, that some rights are intrinsically valuable – that is they are valuable as ends in themselves – while others are merely instrumentally valuable – that is they are valuable as a means to an end – and that intrinsically valuable rights have greater weight than instrumentally valuable rights. But there are considerable problems that arise in the application of this approach. In the context of the right to a fair trial, or freedom of expression, is this intrinsically valuable, or merely instrumentally valuable, or both? More importantly, is it correct to argue that something being intrinsically valuable means that it should rank above instrumentally valuable goods? We shall see that different courts reach different conclusions.

B. Why is Human Rights Adjudication Problematic?

We can say, therefore, that courts diverge significantly in their substantive understanding of human rights in ways that result in significantly diverging outcomes in human rights litigation. Before we attempt to tackle the other respects in which the courts significantly diverge, in particular in their approach to interpretation, we need to understand the concerns that have contributed significantly to pressures to develop a distinctively legal methodology of rights adjudication.¹⁶

A distinctive feature of many human rights norms is that they are couched at a very high level of abstraction, and that they engage deeply moral or ethical questions; this is not true universally with regard to all that are considered to involve human rights claims, but these features are sufficiently widespread that human rights practice in general is often considered to be characterised by these features. Given these features, what do institutions do when they try to work out what these abstract moral or ethical propositions mean when they need to be applied in particular circumstances of claimed violation? In particular, how do courts react when faced with this task? And the answer, at an equally high level of abstraction, is the same for all courts. They are required to develop a certain practice of justification for the extensively *interpretative* function that they are undertaking when they adjudicate human rights claims. The courts are much less able, or likely, to rely on justification from *authority* that is more central to other areas of judicial adjudication.¹⁷ In developing an appropriate justification of their interpretative function, courts need to be aware that there are two main criticisms that have been made of judicial adjudication of human rights issues, other than simply criticism of the substantive differences at which human rights courts arrive. As Cameron suggests, the issues of *judicial competence* and *judicial legitimacy* predominate in discussion. Each has several dimensions.

¹⁵ Robert Alexy, *A Theory of Constitutional Rights* (trans) Julian Rivers (Oxford, OUP, 2002).

¹⁶ von Bernstorff, chapter four of this volume.

¹⁷ Cp Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, OUP, 2009).

Those concerned with *judicial competence* in the human rights area question whether human rights issues have particular dimensions that mean that judges are ill equipped to handle them, and (usually) that other institutions of government are better equipped. So, for example, we could question how well equipped the courts are in deciding questions of fact in national security cases: are judges prevented by the training that they receive, or because of the institutional context in which they operate, from making accurate findings of fact that there is, or is not, an existential threat to a particular country from terrorism? Krebs (in chapter nine) questions whether, under current institutional limitations, the judges are competent to do so. Her argument is organisational and not personal; it is not that the judges are not professional enough, but rather that the processes, the institutional limitations, and the dynamics that develop around national security cases, prevent them from being able to conduct effective review of secret evidence in counter-terrorism cases. A similar issue arises in the context of adjudicating socio-economic rights issues, which have often been thought to involve 'polycentric' issues unsuited to judicial methods.¹⁸ By contrast, those concerned with *judicial legitimacy* in human rights litigation include concerns that, irrespective of whether judicial institutions are *competent* to handle such issues, it is illegitimate for other reasons that they should do so, such as for democratic reasons, or reasons based on the separation of powers. The issue of the relationship between the courts and the democratic process is one that refuses to go away, particularly so when the rights in issue are seen as explicitly anti-majoritarian. Why should judges rather than elected politicians get to decide these issues?

For reasons of institutional survival, if for no other reason, the courts themselves have a compelling interest in heading off any significant crisis of faith in human rights adjudication, based either on competence or legitimacy. The courts are themselves deeply interested in negotiating both the issue of judicial incompetence and that of judicial illegitimacy. All the courts share a central problem of how to secure and retain legitimacy when interpreting often highly indeterminate texts. The only way, ultimately, to secure this legitimacy is by persuading their audiences that what they are doing is exercising *legal* judgement, as Justice Breyer argues in *van Orden*.¹⁹ The ultimate authority of all these courts lies in the power of the written word and the wisdom of their decisions. Each court has wrestled with how best to justify to its audiences how it is exercising *legal* judgement in the contentious areas of human rights, and each has developed a range of techniques for doing so, but the problem of legitimacy remains. One approach that the courts have developed, seeking to address the issue of judicial legitimacy, is the adoption of interpretative principles that attempt to distance their ultimate decision from being seen as simply political or simply moral. The other approach, seeking to address the issue of judicial competence, is that the courts have adapted the institutional characteristics of the courts themselves. We turn now to consider both these approaches.

C. Judicial Distancing Strategies: Diverging Interpretative Moves

We can identify several techniques that courts adopt in attempting to construct a workable and convincing approach to human rights adjudication that is distinctively legal

¹⁸ As Wesson, chapter fourteen of this volume, suggests.

¹⁹ *Van Orden v Perry*, 545 US 677, 698 (2005) (Breyer J, concurring) (United States).

and does not fall into the traps just described. Courts attempt to distinguish what they are doing in adjudicating human rights claims from simply acting as political or moral actors by using 'distancing devices'.²⁰ Each, though in different ways, responds to the need to give reasons that the judges will hope to be discerned as genuinely legal reasons, relying on legal sources to base justifications for decision-making, not (just) political or moral arguments, and adopting criteria for legitimate judicial human rights methodology that seek to provide, as von Bernstorff suggests they must, a degree of coherence and predictability.

(i) Textual and Originalist Interpretations:

Different methodologies have been proposed for trying to answer the question of what human rights involve as a legal issue. One approach to the question is descriptive. One variant of the descriptive approach attempts to answer the question by developing a simple narrative about how the term has come to be used, and how its usage has developed and changed. Another type of descriptive approach is that of categorical designation, which lawyers often adopt. We say that human rights are those rights designated as such by law, whether domestic law, or international law. So, to the question, 'what are human rights?', one response is to say: look at the Universal Declaration of Human Rights, or look at the International Covenant on Civil and Political Rights, or look at the German Basic Law.

This 'descriptive' approach has given rise to two different methods of interpretation. One is the *textual method* in which the court regards the actual words of the written text as determining the application of the text to the problem before the court. This approach is often combined with an approach that emphasises the meaning of the words as intended by the legislator. Usually this *historical method* is concerned less with the dictionary meaning and more with broader understanding of what the textual provision was intended to achieve as revealed by an analysis of the legislative history or the *travaux préparatoires*. In the case of a constitution, this could involve the understanding of the ratifying convention or of the drafters.

Textual and historical approaches are considered by some judges in human rights courts to be important bedrocks to justify their conclusions, because they are the closest that courts can come to the classic authority-based justifications for judicial reasoning. Courts rely on originalist approaches, and on the historical authority of the founding fathers, to justify the preferred conclusion, or courts rely on the plain meaning of the text to determine the issue. Babie and Krumrey-Quinn point to the importance attached to the inclusion of sexual orientation as one of the grounds of non-discrimination in the South African Constitution as an important source of justification for the expansive approach taken by the Constitutional Court in gay rights.²¹ Different texts give rise to different legal results. Sometimes texts really matter and the court considers that it simply has no alternative other than to follow the plain words. We should not ignore, therefore, the extent to which differences in results between courts in different jurisdictions arise directly from different textual provisions being present. Despite there being significant overlapping consensus between human rights texts, particularly those enacted after

²⁰ J Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in L. Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge, CUP, 1998).

²¹ See also van der Vyver, chapter twelve of this volume.

1945, significant areas of divergence persist. Some relevant constitutional texts, particularly modern ones, address the issue, with the consequence that the court will have reduced capacity and responsibility to develop its own approach. Thus, the extent to which primary legislation is reviewable may well be determined in the text.

The emphasis that some courts, in some contexts, give to text is important, not least because it calls into question the extent to which human rights interpretation can legitimately be understood as involving only a 'balancing' or proportionality analysis. The latter approach downplays the idea of rights as texts instantiating legal rules in certain circumstances. It may underestimate the effect of rights as textually or historically based if the courts are seen as simply balancing everything (whereas some rights are not balanced, for example, torture under the ECHR), and also overemphasises the role of rights as textually determined, by finding *prima facie* rights everywhere (whereas there are limits *ratione materiae* and *ratione personae* to rights in all legal instruments).

We can point to other particular features of human rights texts in those jurisdictions being compared to illustrate the areas in which such divergence arises. Jurisdictions vary in the extent to which the Bills of Rights provisions are attempting to deal with specific historical problems of that country. The German Basic Law is particularly rich in examples of this phenomenon, with extensive provisions dealing with states of emergency, and militant democracy that clearly reflect that country's experience during Weimar. Jurisdictions also vary in the extent to which the rights guaranteed apply only to citizens of the country. In Germany, again, several provisions of the Basic Law only apply to protect German citizens; in Canada educational language rights and freedom of movement only apply to Canadian citizens; in South Africa, political rights apply only to citizens. Jurisdictions also vary in the extent to which they protect property rights, with the strong property rights protections in the Irish Constitution in marked contrast to the very limited property rights protections in the Indian Constitution, and the absence of any in the Canadian Charter of Rights. Jurisdictions also differ extensively in the extent to which they explicitly recognise socio-economic rights, with South Africa clearly a relative outlier in this respect, as far as the jurisdictions considered in this book are concerned, with its extensive and detailed provisions. So too, the jurisdictions differ in the extent to which they protect minorities as groups, with the Indian and Hungarian Constitutions taking a strong group-based approach that is in marked contrast with the individual rights protections apparent elsewhere.

The human rights texts differ too in the ways and the mechanisms they provide for implementation and enforcement. Canada, New Zealand, and the United Kingdom provide examples where the 'counter-majoritarian' difficulty is recognised, but in significantly different ways, with Canada granting the federal and provincial legislatures an override power, New Zealand preventing the courts from reviewing legislation at all, and the United Kingdom adopting the half-way house of permitting the courts to make declarations that legislation is incompatible with the Human Rights Act 1998, which have no legal effect between the parties. These apparently technical differences mask significant theoretical differences in what relationships they contemplate between the courts and the democratic institutions of the state.

We should not, therefore, ignore the importance of text or of historical understandings for the courts. Yet for courts to adopt either of these approaches to the exclusion of others is also problematic. For the courts simply to rely on the descriptive approach, relying simply upon history or text seems naïve. Texts are so open ended, and drafted at

such a level of generality, that the really hard questions of interpretation are not at all clearly addressed, and we must (either explicitly or implicitly) adopt a theoretical approach to the meaning of human rights in order to interpret them. Not surprisingly, then, there are important examples where text and history seem much less evident and much less important. There is a strikingly useful example that Pillay provides of constitutional borrowing by India of the Irish constitutional mechanism of directive principles, in which the close similarity of the drafting of the two sets of provisions has not resulted in a similar approach being adopted by the Irish and Indian Supreme Courts. Instead, we find the opposite, apparently showing the relative unimportance of text and history in this particular context.

(ii) Normative Reasoning

The alternative to the adoption of a 'descriptive' approach is that of an explicitly 'normative' approach to the idea of human rights. In the seventeenth and eighteenth centuries, advocates of rights derived them from God, or from what was 'natural'. In our own day, there has been no shortage of explanations of the normative underpinnings of human rights. Some have argued that they derive from the concept of equal concern and respect, some from notions of distributive justice, some from ideas of what is necessary to satisfy basic social needs. And the idea that the definition and interpretation of human rights involves a normative element is one to which some of the judges we will be encountering in this book are strongly attached. This contributes to the significant ideological differences between the courts in their understanding of human rights in general and their understanding of specific rights in particular. As we have seen, ideological differences between the courts are clear. Judicial review, perhaps particularly in the context of human rights cases, often involves highly contested issues of morality, ethics and values, and courts are mostly highly conscious of the need to develop methods of dealing with it.

Yet, for the courts to adopt a straightforwardly normative approach is problematic. In particular, there is a persistent concern that adjudicating human rights issues involves judges relying on their own subjective/political weighting of interests to a greater degree than they would in other areas of legal decision-making. These concerns are often expressed as giving rise to conflicts with the 'rule of law', in so far as judicial adjudication fails to erect stable and predictable standards of human rights protection,²² and with the principle of the 'separation of powers', in so far as it leads to an allocation of responsibilities to courts that are properly the domain of other branches of government because they should properly be made by way of democratic decision-making.²³ One type of normative reasoning in particular is heavily criticised: that type of reasoning which involves judges 'balancing' different interests and deciding where the balance of advantage lies, taking everything into account. Where courts are engaged in 'balancing' of rights, or rights and other interests, the question of the legitimacy of judicial decision-making is often raised – isn't balancing a 'political' function? In particular, von Bernstorff's functional account of judicial decision-making strongly criticises *ad hoc* balancing.

²² von Bernstorff, chapter four of this volume.

²³ Especially in national security and (Wesson, chapter fourteen of this volume) socio-economic rights areas.

(iii) *Developing Alternatives to Pure Normative Reasoning and Pure Description*

The bulk of the reasoning discussed by the contributors to this book involves neither purely descriptive, nor purely normative analysis of the type just described. Instead, what we see is the evolution of alternative approaches to justifying judicial adjudication of human rights claims. Four methods of interpretation not so far discussed may be identified: a *functional or structural method* that emphasises neither the text nor the historical meaning, but the way in which the provision to be interpreted fits within the legal (often the constitutional) system as a whole, encouraging an interpretation of a right that ensures that the system functions in a coherent, harmonious way; a *doctrinal method*, in which the decision is based partly on an analysis of judicial precedents, which are regarded as imposing an obligation (or at least a strong pressure) on the judge to follow or at least distinguish them in subsequent analogous cases; a *prudential method*, involving the judge assessing the consequences of each possible interpretation, including such considerations as convenience, efficiency, and political support; and a *teleological method*, which identifies the end or purpose that the provision to be interpreted is intended to achieve, and interprets that provision in the way that optimises the prospects of its realisation.

The contributions that follow this Introduction show how different courts give greater or lesser weight to these different methods, resulting in four particular characteristics of judicial interpretation in human rights cases: the use of categorical reasoning; the adoption of proportionality analysis; the use of judicial borrowing from other jurisdictions; and the development of meta-principles as a method of resolving conflicts. We shall have more to say about how these differing approaches interrelate, and how none has proven uncontroversial but, for the moment, we need to identify the essential elements of each.

(iv) *Categorical or Definitional Approaches*

Möller argues that '[c]ontemporary rights jurisprudence' splits the analysis of a human right, which has alleged to have been breached and is the subject of litigation, into two stages: first, whether the contested measure interferes with the right, and second, if it does, whether the justification offered for the interference is 'proportionate'. Möller argues that the first stage 'has become less and less important in practice'. Others disagree, in particular Babie and Krumrey-Quinn, who stress that 'categorical' approaches to rights interpretation, in which primary emphasis is given to the first stage are of prime importance in some jurisdictions, with respect to some particular rights. This dispute involves two distinct questions. First, is the second stage proportionality analysis the dominant judicial approach to human rights adjudication across jurisdictions? Secondly, even if it is, are some rights generally excluded from this approach; does proportionality apply across the board to all human rights or only some?

We shall return to consider the second issue in a moment; it is the former issue, however, that generates the most debate between the contributors, with the United States' approach to rights adjudication being identified by several contributors as a central case in which categorical reasoning predominates, rather than proportionality analysis. The classic example is in the jurisprudence of the United States Supreme Court interpreting the First Amendment, in which adjudication frequently focuses on the definition of the right, rather than any justification for infringing it. Babie and Krumrey-Quinn argue

that the United States has adopted a categorical approach on the issue of the rights of religious institutions to exercise internal powers without interference. King also contrasts a United States categorical approach to rights, involving fewer tradeoffs, with a balancing approach to rights, requiring more frequent tradeoffs with other interests. He suggests that the American rights culture has a greater reluctance to engage in balancing and that the more dominant American view is of 'rights as trumps', with the effect that the circle of protected rights is more narrowly drawn, but the protection accorded to those rights within the circle may be greater.

Adopting a categorical approach, under which proportionality is not predominant, means that the courts may appear less flexible. But courts that generally adopt a more 'categorical approach' have sometimes developed other practices to cope with these types of situation, where they think it may not be appropriate for the Court to intervene for the moment, but where they may not want to wash their hands of the relevant issue in the future. The legal scholar Alexander Bickel termed the use of such techniques by the United States Supreme Court 'the passive virtues'.²⁴ He emphasised how the Supreme Court 'wields a threefold power'. It may strike down legislation as inconsistent with principle. It may, by contrast, legitimate legislation as principled. 'Or it may do neither ... and therein lies the secret of its ability to maintain itself in the tension between principle and expediency'.²⁵ A court has many ways of 'not doing'. It may deny that it has jurisdiction to hear a case, or argue that the plaintiff lacks standing to bring it; it may dismiss a case for lack of ripeness or refuse to hear it on the ground that it raises a 'political question' best decided by the legislature; or, it may decide a case on a narrower basis than that proposed by the parties and carefully avoid key constitutional issues. Hickman and Tomkins show clearly how the absence of a proportionality-type approach in the United States courts on national security issues, and the adoption of a categorical approach, led to the courts deciding that no judicial intervention was justified, in contrast to the approach initially adopted in the United Kingdom courts. For other contributors, however, the sharp dichotomising of some jurisdictions as adopting a categorical approach whilst others adopt a proportionality approach is much too crude, as a general proposition.

(v) *Proportionality*

The perceived attraction of the proportionality test, as Möller points out, is to avoid the accusation that balancing is merely the exercise of a straight-forward political judgment by the courts, whilst also giving the courts sufficient flexibility to take all relevant considerations into account. The concept of proportionality plays a dual role in the contributions that follow. On the one hand, it provides the topic of one of the sections; on the other hand, it is also discussed extensively in the other sections discussing the three substantive areas of religion, security, and socio-economic rights. There are four particular issues that it is useful to identify in this Introduction regarding proportionality.

²⁴ Alexander M Bickel, 'The Supreme Court, 1960 Term-Foreword: The Passive Virtues' (1961) 75 *Harvard Law Review* 40; and Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis IN, Bobbs-Merrill, 1962).

²⁵ *ibid.*, 69.

The first relates to the prevalence of the concept in practice. Like Möller, Yowell shows that proportionality analysis is increasingly understood as lying at the core of judicial approaches in the new global constitutionalism. Here, the key issue is whether the same or a closely related concept is being used in those jurisdictions in which the term 'proportionality' is not normally used, in particular the United States. There is an important internal debate among the contributors about how central balancing and proportionality actually is in United States constitutional rights interpretation, with Yowell arguing that it is extensively adopted, whilst King argues that the absence of textual language explicitly permitting balancing has led to reluctance to engage in balancing in a range of socio-economic rights cases at the state and federal levels.

The second is the opposite of the first. Here, the issue is whether, in those contexts in which the term 'proportionality' is used, the similarity of the term camouflages significant differences in the use of the concept in different jurisdictions. In other words, even where the same term is used, is the same conception of proportionality in play? David Bilchitz identifies how there has been a tendency to converge on the use of proportionality analysis, but he argues that there are several different proportionality tests depending on the jurisdiction identified, and even within jurisdictions. A key difference is often what intensity of judicial scrutiny is involved. Again, there is a degree of variation in the contributors' assessments of how far differences in the conceptualisations of proportionality are in fact significant.

The third issue arises from Möller's view that the *prima facie* right in the European context does not do much work in the context of proportionality analysis. Although this argument appears to be uncontested by other contributors to the proportionality section, some evidence arising from the substantive rights sections appears to call that assessment into question. Even if Möller's analysis generally captures the emerging dominant European approach to rights adjudication, at the domestic level in several countries and under the ECHR, there remain several rights where the interpretation of particular rights bucks that general trend, most notably under Article 3 ECHR (prohibition on torture, etc), in which the first stage dominates, and the second stage is non-existent, and in the context of Article 9 ECHR (freedom of religion), in which the first stage remains critical even where proportionality analysis is important also.

Evans identifies four approaches courts have taken to negotiate the tensions between religious freedom and rights not to be discriminated against, only one of which involves balancing/proportionality approaches. In addition, the first stage may actually be doing more work even when proportionality operates, where the later balancing stage is intensely affected by the importance attached to the *prima facie* right. Here, the question of distinguishing the 'core' or 'essence' of the right from less central understandings, with more judicial scrutiny on the first, plays a significant role. Ryan Goss, for example, describes (in chapter six) how critically important the technique of distinguishing core and periphery aspects of the *prima facie* right has become in the national security area in Canada, a jurisdiction in which the proportionality approach is also much in evidence.

The fourth issue is whether Möller is correct in his argument that, with the predominance of proportionality, categorical reasoning drops out of the reckoning. As Bilchitz points out, adopting a strategy of deference to the legislature or other institutions of government, either in general or with regard to specific areas, is frequently in evidence in jurisdictions adopting a proportionality approach. But there remains a significant problem of determining when to apply deference. Various examples of 'deference' by the

courts are evident in the contributions in this book, not least in the chapters dealing with judicial review of national security issues. The doctrine of the 'margin of appreciation' by the European Court of Human Rights is a classic example, and perhaps the most obvious. But there are other less dramatic methods on display. Some courts have adopted standards of review, less interventionist as regards review of legislation, that appear to involve the re-importation of categorical reasoning into proportionality analysis. When the Court of Human Rights decides that it accord a wide margin of appreciation to states in areas of sexual morality, it reintegrates categorical reasoning into proportionality.

(vi) *Persuasive Precedent and Comparative Law Reasoning*

The doctrine of precedent in the human rights context plays a controversial role. On the one hand, relying on precedent is a classic method of attempting to secure support for a judicial decision, with the judge showing how previous judges have decided a similar issue is the way that the judge now proposes. To rely on precedent is not only to follow the principle that like cases should be decided alike, but in doing so also to seek to defuse criticism that the decision is simply an expression of the judge's own preferences; the judge is just following what his or her predecessors have done. On the other hand, human rights has an important disruptive role, sometimes seeking to challenge orthodox ways of viewing established relations, and judges must be conscious of the need to adapt the law to ensure that it conforms to human rights standards; it is noteworthy that precedent is more often thought in human rights cases than in other areas of law to be persuasive rather than binding, even in those jurisdictions in which the common law doctrine of precedent is generally followed.

Legal precedents usually come from courts in the same legal system as the judge relying on them, but the contributions to this book identify a variant on this approach. In the discussions of the case law, there are also examples where the courts in one jurisdiction have examined and cited the approaches adopted in a *different* jurisdiction, with a view to considering how the foreign approach might help in deciding the case before it, and in helping to justify it, demonstrating how the court's decision is driven by law rather than by politics, as Evans suggests. Johan Van der Vyver identifies (in chapter twelve) how the South African courts use American jurisprudence in religion cases. Goss identifies the influential use of comparative experience by the European Court of Human Rights in the *Chahal* case, based on experience in Canada, leading to the adoption of the special advocate scheme in national security cases in several other jurisdictions. Cole and Vladeck show how comparative analysis was used by the Supreme Court of Canada to arrive at a conclusion as to what was required under the Canadian Charter in the context of national security cases by helping the court make an empirical judgment as to the consequences in practice of various interpretative options. In these cases, the courts appear to consider that a comparative approach is particularly compatible with a view that human rights are of universal (or at least transnational) significance, and that this will be an appropriate distancing device.

We also know, however, that this practice of judicial borrowing across borders is far from being a settled practice and, indeed, remains highly controversial in particular jurisdictions, notably the United States, where the acrimonious debate between the justices on the appropriateness of the practice in adjudicating rights is well-known, and

where those opposed to the use of such comparisons often view these rights as culturally relative and contextually contingent. But the United States is far from unique in its skepticism about the use of such borrowing. In their contribution, Babie and Krumrey-Quinn point out that Australian courts are not drawing on United States jurisprudence on religious freedom issues, despite the Australian constitutional provisions being modeled to some extent on these provisions, because of the apparent textual differences between the provisions as well as the countries' differing historical contexts, a neat example of how different distancing techniques may clash. More importantly, however, the use of techniques of judicial borrowing does not escape the dichotomies we have discussed; rather they are imbedded within this technique. As Lazarus observes: '[t]he comparativist must walk a tightrope between respect for local variation and the assertion of generalisable truths'.²⁶

(vii) *Role of Meta-Principles*

Just as the issue of proportionality can be seen as arising throughout the book, so too, the role of meta-principles crops up continually. Several meta-principles are particularly prevalent in rights interpretation: autonomy, liberty, equality, and democracy are each identified by one or more contributor as influencing on interpretation of specific textual provisions, so that in some cases, the conflicts and tensions between specific rights often appears to be translated into a conflict between meta-principles. Perhaps the most (currently) controversial of these meta-principles is the principle of 'human dignity', which arises in the context of discussions of proportionality (von Bernstorff), and the right to open justice, but is particularly discussed in the context of socio-economic rights. O'Connell identifies the use of dignity in socio-economic rights adjudication in the German context. Pillay's contribution points to the importance of dignity in the context of socio-economic adjudication in the Indian context. Cameron identifies the use of human dignity as an important consideration in the social rights jurisprudence of the South African Constitutional Court. King shows how a recent United States Supreme Court case used the concept of dignity as a basis for justifying requirements to provide adequate medical care for prisoners. However, if the courts using the concept of human dignity thought that they were adopting a device that would lessen the controversy surrounding their human rights decisions, the opposite appears to have been the case, and the use of human dignity has generated yet further controversy.

(viii) *Adapting the Institutional Capacity of Courts in Divergent Ways*

Finally, we can identify how some courts are in the process of developing new approaches to adjudicating rights issues, what O'Connell describes as the changing 'technology' of judicial review. These changes appear to be driven, at least in part, by judges' concern to address issues of judicial competence. Thus, as King argues, drawing on American scholarly literature originating in the 1970s, courts have developed a 'public law' litigation model comprising several features: facilitating greater amounts of empirical information being made available to the court (Paul Yowell notes the strong connection between proportionality-type review and use of empirical evidence), permitting judges to become

²⁶ Lazarus, *Contrasting Prisoners' Rights* (above n 4) 10.

more centrally involved in constructing and managing human rights adjudication (Goss describes in the national security context how the courts sometimes take on the role of manager of the process of litigation, by becoming involved in deciding how much and what evidence will be made available), breaking out of the perceived strait-jacket of the adversarial process (Pillay discusses in the Indian context of socio-economic litigation how courts have adapted their procedures to deal with human rights claims, for example by more relaxing rules of standing; Krebs shows the extent to which human rights adjudication in the national security context requires the courts to adapt the judicial process to accommodate their role by functioning in an inquisitorial mode); increasing judicial flexibility through new structural injunctions and other new forms of remedial orders (Cameron identifies procedural developments in the SA context such as the: crafting of new remedies; for example, the requirement of 'meaningful engagement' of the parties as a remedy), and constructing more 'dialogic' models of judicial review, where courts enter into a continuing relationship with other institutional actors in order to address the problem (Krebs shows how Israeli courts developed new procedural techniques in order to accommodate new functions, including playing the role of mediator between the parties).

D. *Looming Legitimation Crisis?*

The very creativity of the courts in addressing the challenges of legitimacy and competence has clearly not worked, if by 'working' we mean that it has satisfied public opinion that human rights judging is legitimate and competently handled. Indeed, the interpretative flexibility of the courts, and their openness to procedural changes have probably increased suspicion that the courts are making it up as they go along.

If taken to an extreme, attempts to construct an approach to judicial decision-making in the human rights context to distance the courts from being seen to be political are bound to fail; courts are only relatively autonomous from the political sphere in the first place. Evans points to the shifting positions of courts in human rights cases concerning religion, in which they react to social changes, especially the increased religious diversity of particular communities. Pillay shows how the Indian Supreme Court in the socio-economic rights context is moving towards a more market-driven economic growth model and away from direct government-initiated redistribution. Her explanation turns partly upon changes in the political climate; this illustrates again how courts are only quasi-autonomous agents.

Nor have the institutional changes introduced by courts necessarily provided a successful mechanism for effective decision-making. Pillay distinguishes between interpretation and implementation, and argues that the one should not be confused with the other; appropriate implementation requires deep appreciation of the social context based on empirical information. King argues for the value of empirical legal studies in this area in order to develop a better understanding of the dynamics of rights litigation. Cole and Vladeck, and Krebs, use interviews to generate empirical information about how different methods adopted by the courts to reconcile national security with due process works in practice. King considers the impact of litigation on the delivery in practice of socio-economic rights. Each of these authors points to significant gaps between the doctrinal position of the courts, and the delivery of their decisions in practice, thus

bringing back into contention the competence of the judges in these areas, even when the courts have adapted their processes in the ways discussed above.

As a result, some of the contributors go so far as to identify elements of a possible credibility crisis in human rights adjudication.²⁷ Babie and Krumrey-Quinn identify examples of political backlash against activist human rights courts in the state of Victoria, Australia. King points to a backlash in the United States arising from the negative consequences of litigation in socio-economic rights area. O'Conneide identifies a political backlash against the Constitutional Court in Hungary reacting against perceived judicial activism on human rights. Hickman and Tomkins give a detailed account of backlash against judicial activism in a human rights context, one that did not primarily involve the jurisdiction directly concerned (UK) but another affected jurisdiction (the US).

III. CONCLUSION

Within any particular legal system, human rights law or judicial reasoning in human rights cases possess those characteristics that we consider such phenomena to possess 'just in virtue of its being legal', as Joseph Raz put it.²⁸ Human rights law *across the different jurisdictions*, being *law*, also shares the features of what is considered to be common to legal provisions, such as the use of concepts such as rights and duties, obligations, rules, and principles.²⁹ To that minimum extent, therefore, there is a clear universal quality to human rights adjudication, examined comparatively, because we are dealing with *law*, not necessarily because we are dealing with *human rights law*.

The courts considered in this book do, however, also share a common dilemma: how to convince their audience that their adjudication is *legal*. But the methods the courts have adopted to address the central problems of competence and legitimacy seem to play off against each other. The combination of issues of judicial competence and judicial legitimacy appear to amount to a classic double bind, in which contradictory demands are made, and those seeking to justify continued judicial involvement in human rights issues are pointed in potentially conflicting directions. On the one hand, the more the courts behave as distinctively legal institutions, the more they look like *courts*, not adapting their processes and procedures, the more likely they are to be considered incapable of dealing with human rights competently because they are out of touch, preoccupied with technical distinctions and engaging in overly refined argumentation. On the other hand, the more the courts change their procedures and institutional practices to become 'competent' in this sense (the more they begin to look like a cross between a parliamentary committee and a Cabinet committee, and the less they look like 'courts' in the traditional sense), the more the public may wonder why they have any greater legitimacy to make highly contested human rights decisions than any of the other branches of government whose processes they now ape (and whether, compared with legislatures, they have a great deal less since they are generally not elected).

²⁷ von Bernstorff, chapter four of this volume.

²⁸ J Raz, 'On the Nature of Law' (1996) 82 *Archives for Philosophy of Law and Social Philosophy* 1, quoted by Lazarus, *Contrasting Prisoners' Rights* (n 4 above), 10.

²⁹ Lazarus, *Contrasting Prisoners' Rights* (n 4 above), 10.

Apart from sharing the minimum features that go to make human rights law *law*, and facing similar pressures to account for their decisions, we have seen that the way in which apparently similar concepts are instantiated in any particular legal system may vary extensively. As Lazarus has argued, legal concepts (including the legal idea of human rights) 'can have both universal and parochial qualities'.³⁰ Human rights law appears to lack an uncontested structure, content, method or consistent theoretical underpinning across jurisdictions. This legal pluralism appears to be the result of claims involving competing and, sometimes, incompatible substantive values, each supported by credible human rights sources and interpretations. Human rights, as interpreted by the courts, function in apparently contradictory ways: they look forward but also backward; they appeal to both communitarian and individualistic values; they juggle both the particular and the universal; they struggle between continuity and change; they empower the state, and they challenge its power. Courts seem to be constantly caught in these opposing forces. Thus far, the courts, considered comparatively, have failed to provide much more than a set of opposite and conflicting propositions, useful in providing a language in which to articulate each decision, but not amounting to a principled and coherent system.

³⁰ Lazarus, *Contrasting Prisoners' Rights* (n 4 above) 10.