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REVIEWED BY CELIA R. TAYLOR*

CLAPHAM, ANDREW, HUMAN RIGHTS IN THE PRIVATE SPHERE, OUP Publishers. New York (1994); (\$68.00); ISBN 0-19-825799-6; 388 pp. (hardcover).

Those seeking to expand human rights protections have two primary avenues of attack. One is to argue that the definition of "human rights" should be interpreted broadly to include a wide spectrum of economic, cultural, and social rights as well as political and civil rights. Another is to argue that firmly established rights should be protected in more contexts than the current position of international law now deems appropriate. Andrew Clapham's *Human Rights in the Private Sphere* focuses on the second of these approaches to broadening human rights protection. In this work (part of a series designed for lawyers but intended to have impact on the actual conduct of international relations), Dr. Clapham challenges the traditional notion that human rights only protect citizens from abuses of power by states. He argues that the fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR)¹ are applicable in the private sphere and should be enforced and protected against action by non-state, as well as state, actors.

Human Rights in the Private Sphere attempts to present both a practical and theoretical approach to the question of how international human rights norms could be applied to actions against non-state actors, using as a model an examination of how the European Convention on Human Rights might be relevant in the courts of the United Kingdom. The "practical" portion of the analysis is based in part on a detailed examination of case law generated by the European Commission and the Court of Human Rights interpreting and applying the ECHR and on an analysis of the European Community legal order and the case law of the European Court of Justice dealing with human rights issues. Another chapter in the "practical" section considers the approach taken by the United States and Canada when confronted by similar issues concerning the protection of "fundamental rights" and "state action".

The "theory" portion of the analysis considers traditional ap-

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1. A complete list of these rights and freedoms is not provided by Dr. Clapham; nor is the European Convention on Human Rights reproduced in the work. Instead, certain rights and freedoms are discussed in the context of case law and European Court and Commission actions.

proaches to the protection of human rights in the private sphere in various fields of international law. Clapham traces recent changes in this arena, and argues that in light of these trends towards expanded protection, the ECHR must be considered applicable in the private sphere. Once the premise of protection is accepted, the issues left to resolve are which of the rights recognized by the Convention apply in the private sphere and to what extent. The analysis addresses these questions in the framework of the current state of theory application.

Caution is a fundamental theme underlying both the practical and theoretical discussions in the work. Caution is evident in the careful and in-depth analysis given to the relevant case law, an analysis that will make the book of particular interest to lawyers conversant with United Kingdom, European Court of Justice, and Court of Human Rights practice. It would have helped readers not trained in European Community law and legal systems if the book provided an overview of the various legal entities and their relation to each other. In the absence of such a guide, the reader must struggle through this complex web alone, a difficult but not impossible task. Despite the lack of a "big picture" overview however, the close analysis of individual jurisdictions' actions in the area of human rights is useful to all.

The cautious approach is also apparent in the author's fundamental argument that the ECHR should apply to non-state action despite the fact that only states party to the ECHR can be accused of violations under the current legal structure. Dr. Clapham presents two approaches to surmount this hurdle. First, he argues that the state of international law has progressed to a point where it is no longer possible to "cling to the traditional view that the Convention only covers human rights violations by states" (at 93). He then argues that the distinction between "public" and "private" (i.e. between "state" and "non-state") action is impossible and dangerous to draw.

Dr. Clapham begins his argument with the proposition that a "contextual interpretation" of the European Convention on Human Rights requires that it include violations committed by individuals or private bodies, because international law recognizes that such bodies are capable of committing human rights violations and there currently exist entities competent to prevent, punish or compensate these violations. In support of the argument that the current state of international law sanctions the application of human rights norms to private actors, a detailed analysis of numerous international agreements is provided, focusing on those documents that impose inter-state responsibility,² on international procedures granting individuals the right to

2. Including, among others, the Convention on the Prevention and Punishment of the Crime of Genocide, the Covenant on Civil and Political Rights and the Convention of Economic, Social and Cultural Rights are considered as support for the extension of human rights protection to the private sphere.

complain under existing human rights instruments,³ and on humanitarian law applicable to non-governmental forces under the law of internal armed conflict. The level of detail in the analysis of the current position of international law with respect to the protection of human rights is useful in establishing that state actors may be found responsible for failing to protect individuals against rights committed by private actors. However, there is substantially less support provided for the proposition that private individuals can bring actions for human rights violations under current international law practices. Some examples of mechanisms permitting claims against individuals are provided, but the data seems insubstantial in light of the weight of material supporting state responsibility. Given that enforcement by and against private actors is the theme of the book, the absence of either direct case law support, or strong theoretical arguments as to why the current state of the law does in fact warrant such support, leaves the reader feeling that an essential point is somewhat glossed over.

After attempting to establish that private actors can be held responsible for human rights violations, Dr. Clapham considers how to define what rights should be granted such protection, recognizing that some rights will not rise to the level of warranting protection from all actors. In contrast with the prevailing cautionary theme of the book, Dr. Clapham begins with a seemingly bold statement that "[i]n practice it is impossible to differentiate the private from the public sphere. Even if we feel we can distinguish between the two, such difficult distinctions leave a lacuna in the protection of human rights, and can in themselves be particularly dangerous" (at 94). The proposed solution to this problem is not to abolish all distinctions between public and private; rather, the terms should be avoided as only "dispositive" labels and kept as "explanatory" tools in order to establish when a right has been violated (at 135). After examining briefly the rights and duties analysis of such legal theoreticians as John Rawls and Ronald Dworkin, Dr. Clapham suggests that when determining whether a right is to be protected, the relevant inquiry should be whether the right in question is justified by the goal of democracy or dignity. Where the right is justified by the goal of democracy, there must be a public element in order to justify protection; where the right is aimed at protecting dignity it must always be protected even absent any public element.

The differentiation between "democracy" aimed rights and "dignity" aimed rights is presented as a vehicle to avoid "the intractable riddle of conflicting human rights" (at 146). Unfortunately, while recognizing that human rights can not be categorized neatly into "democ-

3. This analysis includes a useful overview of the work of the United Nations Human Rights Committee and the operations of the United Nations Committee on the Elimination of Racial Discrimination.

racism" rights and "dignity" rights and that rights often have dual purposes, the author makes no cogent attempt to explain how the distinction should be drawn when ascertaining whether protection should be extended. Further, he avoids any discussion of how the determination of whether a "public" element is present differs from distinctions drawn between the public and private sphere. These omissions weaken the ultimate conclusion of the section, but it still serves as a useful springboard for consideration of these vexing definitional problems.

After outlining a mechanism for determining what rights should be afforded protection in the private sphere, Dr. Clapham turns to an in-depth analysis of the current state of rights protection in the United States and Canada, the application of the ECHR to the acts of non-state actors under the law of the European Convention and the Court of Human Rights and under the law of the European Community and the Court of Justice. He then considers how developments in these jurisdictions could affect human rights law in the United Kingdom, returning to the theme expressed early in the work. Dr. Clapham argues that a more explicit recognition of the impact of Community law and Court of Human Rights interpretation of the ECHR on the analysis conducted by UK jurists would justify an expansion of protection in the private sphere. He also addresses the possibility of an outright incorporation of the ECHR into United Kingdom law so that the Convention would be relevant in the sphere of relations between non-state bodies. On the latter point, in keeping with the cautious approach of the work as a whole, the author suggests that any proposed Bill of Rights for the United Kingdom (such legislation is currently under consideration) should require incorporation of the ECHR, but should remain silent on the issue of the application of Convention rights in private actions. While not deviating from the general proposition that rights should be protected against private actors, Dr. Clapham suggests that many situations will be covered by domestic legislation so that the Convention, once incorporated into domestic law, could be used for interpretation. In cases where plaintiffs could not get their complaints before the courts in the absence of an explicit recognition of protection against private actors, a remedy might still be available if the European Commission and the Court of Human Rights found that the denial constitutes a violation of the "right to a remedy" under Article 13 of the ECHR.

The book concludes by briefly revisiting the arguments made in the main text, stressing that the goal is to consider how existing legal systems and norms serve as the basis for interpreting the ECHR as a vehicle to protect all victims of human rights abuses, not just those who suffer at the hands of state actors. As an exposition of the current state of the law in this area as interpreted by the Court of Human Rights and the European Court of Justice and as applied in the United Kingdom, the book meets this goal admirably, due in large part to thoughtful, meticulous case-law analysis. On the theoretical front, the

arguments and analysis of how and why to protect individuals against private actors, while not ultimately convincing to this reader, serve as a useful starting point for discussion of this very important topic.

