Book Review

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The Liberty of Non-citizens: Indefinite Detention in Commonwealth Countries
by: Rayner Thwaites
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The use of detention as a technique of border control, national security, and migration management has grown in recent years, particularly in countries of the global north, yet has a longer trajectory in western states' treatment of 'dangerous' or 'unwanted' foreigners. Detention may be used for a variety of administrative reasons, yet in most jurisdictions the primary purpose is to facilitate the expulsion of 'unlawful' non-citizens. Although most European states have restrictions on the duration of immigration detention, countries such as the UK, Canada, Australia, and the USA do not, thereby permitting the detention of non-citizens for indeterminate periods of time. The practice of indefinite detention raises a number of important moral, ethical, legal, economic, and political questions about the rights of 'foreigners' within our societies, especially for those who cannot easily be expelled.

In *The Liberty of Non-citizens*, Rayner Thwaites provides an in-depth exploration of the legality of indefinite detention in three countries: the UK, Canada, and Australia. The central legal issue under examination is whether detention is still authorised if a non-citizen cannot be removed. At play are a variety of legal rules, including human rights protections, that compete with a given state's insistence on getting rid of those deemed 'dangerous' to national security or who are simply 'unwanted' migrants. Based on his comparative analysis of key judicial decisions in these three jurisdictions, Thwaites contends that the courts' findings hinged on judicial views about 'the scope of the liberty interest in democratic societies' (p.4). The varying decisions reached, he argues, were not about any difference in legal structure, but rather because of the differences in 'judicial mindset' (p.306) – a mindset reflecting either a rights-precluding or a rights-protecting approach. Thwaites refers to a rights-precluding approach as one in which 'the right precluded is the right to liberty of a non-citizen against whom a deportation order has been issued' (p.16). In contrast, a rights-protecting model upholds the right to liberty, especially when deportation is not likely to occur in the 'reasonably foreseeable future' (p.15). Throughout the book, Thwaites analyses key court decisions in relation to these two judicial mindsets.

The text is divided into three sections focusing on Australia, the UK, and Canada, respectively. The first chapter of each section introduces the legal context of indefinite detention in the jurisdiction to situate the decisions analysed therein. The following chapter in each section concentrates on the primary decision in each jurisdiction on the legality of indefinite detention if removal is not practicable. For Australia, Thwaites analyses the High Court's 2004 decision in Al-Katebin which the indefinite detention of non-citizens was found to be permissible. In the UK context, the primary decision is that of Belmarsh, where in a 2005 ruling the House of Lords found that indefinite detention was not compatible with existing rights in the UK. Lastly, in Canada, Thwaites considers the Supreme Court's 2007 decision in Charkaoui in which certain procedural protections against indefinite detention were required.

For this reader, Thwaites' detailed legal analysis and careful examination of the jurisprudence makes for a particularly dense read. For those who are not legal scholars, the value of *The Liberty of Non-citizens* lies in its consideration of the uneasy position of non-citizens in western liberal democracies where key principles of liberty and equal treatment before the law intersect with – and challenge – the perceived right of states to control their borders and differentiate among individuals based on citizenship. The book's introduction and conclusion represent a useful resource for non-legal scholars interested in understanding the legal contexts in which the indefinite detention of non-citizens is made permissible, as well as where (and how) the practice is challenged. Importantly, Thwaites points to the potential for jurisdictions to shift to a rights-protecting approach given that the legal frameworks do not necessitate the preclusion of non-citizens' rights. The book thus presents a strong case for the argument that 'a foreigner who is answerable to our laws is entitled to their protection' (p.307).

Book Review

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Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System
by: Dia Anagnostou
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This collection offers analyses of legal mobilisation strategies on human rights issues in the context of the European Union ("EU"). The contributions emphasise the protection of minority rights under both EU law and the domestic law of Member States. This book will be of particular interest to activists, jurists and scholars across disciplines seeking knowledge of EU law and examples of progressive lawyering models which work in complex legal frameworks.

The introductory chapter by Dia Anagnostou traces the development of rights consciousness in the EU. The author introduces the concept of "legal opportunity structure" which connects the chapters: each includes a discussion of legal mobilisation potential based on various factors (16). The chapter overview (20 and following) examines how multiple legal forums increase opportunities for litigation in the EU, but create complex and sometimes inaccessible recourses. The interplay between domestic law and EU law is introduced as a significant theme for the book as a whole (18–21).

The subsequent contributions are divided into three parts: Law, Rights and the Politics of Minorities in National Context; European Courts as Arenas for Legal Mobilisation; and The Role of NGOs and Transnational Human Rights Networks.

In part 1, Bruno de Witte suggests that the rights of linguistic minorities in West Europe have been promoted mainly through means other than litigation. Drawing on examples from Italy, France, Belgium, the UK and Switzerland, de Witte explains that minority language protections largely focus on languages spoken by groups with an established history on the state territory rather than more recent immigrant groups. Italian law protects languages "rooted in a particular part of the country", purposely excluding the Romani language (38). The UK avoids referring to enforceable "rights" in its language legislation, focusing instead on "duties" of the state – which limits litigation in this area (47). De Witte argues that most of the gains of minority language advocates in West Europe have been the result of political mobilisation outside the courtroom (51).

Xabier Arzoz examines intersections between litigation, social mobilisation and electoral politics in the context of minority language protection in Spain. The chapter includes observations on the role of public institutions and employment positions in protecting language rights, which Arzoz distinguishes from human rights (72). Focusing on the Basque language, and linguistic zoning legislation in Navarre, Arzoz writes that a strategy of joint litigation among cooperating parties can promote social mobilisation, as well as the chances of being granted standing to argue before the courts (69). Arzoz is careful to highlight the challenges of litigation for language rights in the courts, including time constraints, a lack of bilingual judges, linguistic prejudice in the regional judiciary and courts' limited ability to create policy change (71; 73–74). Nevertheless, while the author expresses scepticism regarding the capacity of courts to influence public opinion or policy directly, Arzoz notes that "subnational governments are afraid of the political consequences of adverse judicial decisions, above all when elections are near (…)" (74).This is one way court decisions may indirectly influence broader policy choices about language rights in Navarre.

In the third chapter of part 1, Liora Israël offers a different but complimentary level of analysis of legal mobilisation and minority protection. Israël examines activist lawyers' practices in France through a "bottom-up approach" (102). This chapter is explicitly connected to North American studies of cause lawyering (79). Israël chronicles developments in French progressive lawyering, beginning with the defence of activists in May 1968 (83). This was followed by the creation of organisations where political lawyers could combine their talents (84, 86), including the information and support group for immigrant workers (GISTI) which formed in the early 1970s (93). The author describes the lawyers of the GISTI as an "intellectual vanguard" whose mission was in part to build support for their cause from the results of their casework (95, 97). This chapter brings out "the contradiction between the case and the cause, well established in the cause lawyering literature" (97), and an aspect of particular interest to law and social movement scholars familiar with Stuart Scheingold's critique of the "myth of rights" (2, 79, 102, 198).

In part 2, Mark Dawson, Elise Muir and Monica Claes present a "tool-box" for legal strategy in the area of equality law (105). This is a practical discussion of the complexity of rights advocacy in the EU context, where many possible forums may be open (or closed) to the would-be litigant (127). Issues of standing and jurisdiction are covered in a manner which scholars and activists unfamiliar with EU law will find helpful. For example, in an early section devoted to private party challenges to EU law, the authors note the difficulty posed by the restriction on standing to parties who are directly and individually concerned by an issue (110). They write that courts have interpreted this to mean that "private applicants carry standing only when they can distinguish their legal situation from that of *all other applicants*" (110 italics in original). Another challenge explored is the contradiction between the applicability of EU law throughout Europe and differences in procedural rules at the level of each member state (113). While offering a detailed account of the potential and the drawbacks of EU law for equality advocates, the authors maintain a realistic concern for the ability of vulnerable people to obtain access to justice, including legal counsel (114).

Evangelia Psychogiopoulou's contribution, also in part 2, focuses on strategic litigation supporting migrants and asylum seekers. In seeming contrast to the "vanguard" approach of the GISTI (see above), Psychogiopoulou writes that this litigation, prepared

by human rights organisations and migrants' associations, "was the result of the sole determination of the victims to seek redress" despite the difficulty of mobilising vulnerable migrant communities (133, 137). The chapter critically analyses a body of case law which challenges the problematic assumption that "all EU Member States treat asylum seekers in a fair, efficient and fundamental rights-compliant manner (…)" (138). A particular focus in the chapter is the case of *MSS v. Belgium and Greece*, in which an asylum seeker had been released from immigration detention in Greece with no money or housing (137 and following). A disproportionate number of asylum seekers arrive in certain EU Member States, including Greece, but Psychogiopoulou notes the absence of political will to change the current system. She concludes that court judgments may not change policy on their own, but can "serve as a catalyst for reform" in this area (153).

Anagnostou's second contribution to this volume, the first of part 3, focuses on the role of transnational networks in supporting human rights litigation during periods of armed conflict. The author analyses the development of a coordinated, transnational litigation network post-1990, where UK lawyers applied lessons learned from their experiences in Northern Ireland in the 1970s to Kurdish litigation against human rights violations during conflict in Turkey (164, 169). Anagnostou argues that not only did litigants require access to legal forums beyond the member state, but that their legal representation also had to be transnational in character (171).This contribution demonstrates the importance of transnational support networks of cause lawyers and human rights organisations in emergency contexts where appeals to domestic law may be futile.

The final chapter of part 3, by Loveday Hodson, examines how NGO advocacy for gay rights has influenced judicial interpretation of the European Convention on Human Rights. Out of 45 LGBT cases before the European Court of Human Rights, Hodson identifies 29 which involve NGOs (185, and see table on pages 200-203). Early cases which challenged criminal law discrimination against gay men focused on individual applicants, but were supported by emerging social movement organisations which viewed an individual "win" as a potential victory on an international level (187). Later, NGOs worked strategically to end discriminatory legislation using litigation as one among other possible tactics (188 and following). Hodson acknowledges critiques of NGOs as potentially undemocratic, ineffective and unaccountable groups which may do more harm than good (194 and following). Voicing concern for "the contradiction between the case and the cause" (97, see above), the author writes: "The inherent danger in NGO litigation strategies is that the individual's humanity is overlooked" (196). Nevertheless, the author's overall evaluation of NGO participation in gay rights litigation is favourable (198–199).

The concluding chapter returns to the question of the effectiveness of legal mobilisation in promoting justice, with reference to Gerald Rosenberg and to Michael McCann (215 and following). Readers familiar with this debate – which has often focused on the USA (127, 129) – will find stimulating connections with issues raised throughout this collection. However, this book is not merely a restatement of the "myth of rights", adapted for EU law. Instead, *Rights and Courts in Pursuit of Social Change* analyses models of legal mobilisation which have the potential for success in complex and overlapping jurisdictions. This volume is therefore relevant to scholars and human rights defenders working in a variety of international contexts.

Disclaimer

A contributor to this book served as the reviewer's external thesis examiner in April 2014. None of the contributors were contacted during the preparation of this review.