

# Book Review

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## TURNING TO THE COURTS: HUMAN RIGHTS BEFORE THE BENCH

*Judicial Protection of Human Rights: Myth or Reality?* Edited by Mark Gibney and Stanislaw Frankowski. Westport, Conn.: Praeger, 1999. Pp. 207, \$55.00, cloth.

Reviewed by Lawrence Friedman\*

At century's end the cause of human rights has found both inspiration and frustration in the world's domestic courts. Inspiration abides in South Africa, where the judiciary has recognized fundamental human rights consistent with that country's post-apartheid constitutional framework.<sup>1</sup> At the same time, frustration lingers in the United States, where courts have declined jurisdiction over human rights claims by foreign nationals against United States-based multinational corporations.<sup>2</sup> Acknowledging the judiciary's role in negotiating the path between inspiration and frustration, Mark Gibney and Stanislaw Frankowski have assembled the essays in *Judicial Protection of Human Rights: Myth or Reality?* with the immodest goal—in the editors' words—of examining “the degree to which judges have (or have not) served as protectors of human rights.”<sup>3</sup>

The editors contend that the judiciary often occupies a unique position with regard to human rights issues. Working from the premise that “it has not been judges who have designed or carried out the myriad of human

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1. See, e.g., In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 778, para. 10 (CC) (S. Afr.) (observing that, after a long history of deep conflict, “the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights”).

2. See, e.g., In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir.) (1987) (declining on *forum non conveniens* grounds to entertain suit in United States courts by victims of gas leak at Union Carbide plant in Bhopal, India); see also Mark Gibney, Katarina Tomasevski, & Jens Vedsted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 273–77 (1999) (discussing transnational environmental harms and the problems of leveling responsibility for the same).

3. JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? vii (Mark Gibney & Stanislaw Frankowski eds., 1999) [hereinafter JUDICIAL PROTECTION OF HUMAN RIGHTS].

rights violations that are so common,"<sup>4</sup> the editors explore the question whether the judiciary has provided some bulwark against abusive governmental practices. To this end, the essays in *Judicial Protection of Human Rights* range from commentary on the protection of human rights in the emerging democracies in Europe and Latin America,<sup>5</sup> to observations of the changing views of human rights by the judiciaries in Asia and Australia,<sup>6</sup> and to criticism of the failure of American courts to extend human rights protections to foreigners who claim victimization by United States-based multinational corporations.<sup>7</sup>

Taken together, the essays in this collection illustrate the importance of appreciating a judiciary's independence in assessing judicial efforts to safeguard human rights—the importance, in other words, of understanding a court's institutional capacity to effect change.<sup>8</sup> This institutional capacity is a function, in general, of at least two factors, one external to a court and the other internal. Externally, the judiciary *qua* judiciary must enjoy the actual authority within a governmental framework—that is, vis-à-vis the coordinated branches of government—to recognize a human rights claim. This judicial authority must be established in the sense that it may be viewed as reasonably essential to the proper functioning of government. Internally, a court must enjoy the confidence to exercise its authority, for if its members question whether the recognition of a human rights claim in a particular case will serve to undermine the court's authority, they may be reluctant to act.

With institutional capacity so understood, the judicial systems discussed in *Judicial Protection of Human Rights* can be considered as on a continuum of

4. *Id.*

5. See Monica Macovei, *Protection of Human Rights by the Judiciary in Romania*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 3; Igor Petrukhin, *The Judicial Protection of the Constitutional Rights and Freedoms in Russia: Myths and Reality*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 25; and Brian Turner, *Judicial Protection of Human Rights in Latin America: Heroism and Pragmatism*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 89.

6. See Vijayashri Stripati, *Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment: The Role of the Supreme Court of India*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 107; C. Neal Tate, *Judicial Defense of Human Rights during the Marcos Dictatorship in the Philippines: The Careers of Claudio Teehankee and Cecelia Munoz Palma*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 123; Albert Melone & Xiaolin Wang, *Legal Culture, Legal Professions and the Future of Human Rights in China*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 137; and Garth Nettheim, "Retreat from Injustice": *The High Court of Australia and Native Title*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 163.

7. See Mark Gibney, *U.S. Courts and the Selective Protection of Human Rights*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 177. Other essays in *Judicial Protection of Human Rights* consider the protection of domestic human rights by the Supreme Court of Israel, see Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 55, and that court's failure to do the same for the Palestinians in the Occupied Territories, see John Quigley, *Judicial Protection in Israeli-Occupied Territories*, in JUDICIAL PROTECTION OF HUMAN RIGHTS, *supra* note 3, at 69.

8. As Brian Turner notes, "[j]udges who act to defend human rights must be viewed in the context of their institutional position and their perception of the proper role they are to play in that position." Turner, *supra* note 5, at 90.

independence, thus allowing for meaningful comparisons among the diverse systems represented. At one end lies the People's Republic of China. In their contribution, Albert Melone and Xiaolin Wang suggest that the increasing number of professionally trained lawyers, and the entry of these lawyers into the lower ranks of the judicial system in China "create the conditions for at least a gradual infusion of rule of law ideas into Chinese political culture."<sup>9</sup> But it remains the case that the judiciary in the People's Republic of China lacks the institutional capacity to effect human rights reform at a fundamental level: regardless of China's constitutional commitment to civil and political rights, the courts have no actual authority to review legislative and administrative acts, much less the confidence to recognize human rights claims against the government.

Farther along the continuum is the judiciary in the emerging democracy of Romania. The post-Communist Romanian governmental structure reflects a promising commitment to such democratic institutions as the separation of powers. Nonetheless, as Monica Macovei explains in her essay, her country's relatively recent experience with dictatorship continues to inhibit the development of an independent judiciary. While the judiciary nominally enjoys some actual authority within the Romanian governmental structure, lawyers and judges must still reckon with historical understandings of the judicial role that are antithetical to respect for human rights norms. Legislative reforms to the judiciary, Macovei observes, have not been fully implemented, or "disguise deep structural obstacles to the full protection of human rights."<sup>10</sup> Romanian courts, in short, do not yet possess either the actual authority or the confidence to effectuate the promise of human rights recognition within Romania.

In contrast to China and Romania stand the high courts in India and Australia, each of which has in recent years demonstrated the institutional confidence to exercise its authority to effect meaningful human rights reform. As detailed by Vijayashri Sripati, the Supreme Court of India in the 1970s broadened the understanding of fundamental rights under the Indian Constitution to prohibit torture and other cruel, inhuman and degrading treatment.<sup>11</sup> Similarly, as explained by Garth Nettheim, the High Court of Australia in the 1990s ruled that Australian common law should reflect evolving international human rights norms, resulting in a determination that British acquisition of sovereignty over the Australian colonies did not terminate pre-existing rights held by indigenous peoples in land.<sup>12</sup> Neither Sripati nor Nettheim ventures to explain either the reasons for the evolution in confidence of the Indian and Australian courts or, indeed, the nature of

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9. Melone & Wang, *supra* note 6, at 157.

10. Macovei, *supra* note 5, at 22.

11. See Sripati, *supra* note 6, at 117-18.

12. See Nettheim, *supra* note 6, at 169; see also Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 72-74 (1999) (discussing Australian High Court's 1992 decision in *Mabo v. Queensland*).

the foundational commitments to independent judicial authority that exist in India and Australia.<sup>13</sup>

In the United States, of course, the authority of the Supreme Court to exercise the power of judicial review has been respected since the Court decided *Marbury v. Madison*<sup>14</sup> in 1803. More recently, the Court has confidently exercised its authority to protect civil and political rights against incursion by the executive and legislative branches.<sup>15</sup> In *Filartiga v. Pena-Irala*, the United States Court of Appeals for the Second Circuit notably extended the judicial reach over human rights claims by acknowledging jurisdiction over suits by aliens concerning torts committed in violation of norms of contemporary international law.<sup>16</sup>

Notwithstanding these developments, United States courts have declined to entertain litigation involving foreign nationals against United States-based multinational corporations, typically invoking the prudential doctrine of *forum non conveniens* to reject jurisdiction. "Because of the laxity in U.S. law and because American courts are so reluctant to hear suits brought by foreigners against U.S. corporations," Mark Gibney writes, "violations to the integrity of the person continue with impunity—whether it be from unsafe working conditions, [or] egregious environmental practices."<sup>17</sup> Gibney chooses not to theorize on the causes of this judicial reluctance, though he does note the Texas Supreme Court's decision in *Dow Chemical Co. v. Castro Alfaro*, in which the court concluded that a suit brought by Costa Rican banana workers against Dow Chemical and Shell Oil should not be dismissed on *forum non conveniens* grounds.<sup>18</sup> The reader can only speculate whether, given the established authority of the American judiciary, its courts may yet find the confidence to recognize claims against United States-based multinational corporations in other contexts.<sup>19</sup>

Gibney's piece, which closes the book, highlights the central shortcoming of *Judicial Protection of Human Rights*: the failure of the editors or individual authors to inquire whether lessons may be drawn from the experiences of courts that have recognized human rights claims, and whether those lessons can be applied elsewhere. This failure is particularly marked in light of the increasing tendency of judges themselves to engage in comparative legal

13. It is likely no coincidence that these judiciaries, like their United States counterpart, operate within so-called mature democracies, for the commitment to an independent judiciary must find support beyond the fearless inclinations of individual judges.

14. 1 Cranch (5 U.S.) 137 (1803).

15. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding state conviction for flag desecration violates right to freedom of speech).

16. 630 F.2d 876, 887 (2d Cir. 1980).

17. Gibney, *supra* note 7, at 185.

18. 786 S.W.2d 674 (Tex. 1990).

19. Recall that, while the United States Supreme Court had the actual authority to declare *de jure* segregation unconstitutional when it decided *Plessy v. Ferguson*, 163 U.S. 537 (1896), it would not find the courage to do so for another half-century. See *Brown v. Board of Education*, 347 U.S. 483 (1955) (announcing that segregation is a denial of equal protection under the United States Constitution).

analysis to illuminate rights issues,<sup>20</sup> as well as the extraordinary expansion of digital technology, which has allowed unprecedented access to comparative law sources and materials. This is not to say that each of the essays in *Judicial Protection of Human Rights* is not rewarding on its own terms; to the contrary, as discussed above, the individual area studies offer a wealth of information on the judiciaries under consideration. In the end, though, this collection likely will be of greater interest to students of human rights law than to those practitioners who daily endeavor to persuade courts that basic human rights issues warrant judicial attention.

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20. See, e.g., *Ferreira v. Levin*, 1996 (1) SALR 984, 1022–23, para. 66 (CC) (S. Afr.) (Opinion of Ackermann, J.) (drawing on cases from United States, Canada, and Germany in discussing the meaning of liberty under the South African Constitution).

