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## Book Review: Women Under the Law: The False Promise of Human Rights

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*Women Under the Law: The False Promise of Human Rights.* By AILEEN MCCOLGAN. [Harlow: Longman. 1999. xxxiv and 310 pp. Paperback. £17.99. ISBN 0-582-29451-7.]

"THE aim of this book is to challenge the view ... that 'rights' are, in general, a 'good thing'" (p. 1) and "to consider how constitutionally entrenched and judicially applied rights have benefited or disadvantaged women" (p. 32). The claim is that statutory schemes are preferable to "entrenched" or 'constitutional' rights, such as those introduced into UK law by the Human Rights Act 1998," because they are more effective in protecting women and other disadvantaged groups (pp. 1-2).

Methodologically, the book analyses the legal status of women in three areas—reproduction, employment, and violence by and against women—and claims that the conclusions drawn apply to other disadvantaged groups and other areas of law. The United States and Canada are used to illustrate the constitutional approach to rights, while Britain exemplifies the statutory approach.

Though McColgan's book promises much, it fails to persuade the reader for several reasons. First, a number of the examples used to demonstrate the inferiority of entrenched rights actually suggest the opposite. For instance, the book criticises entrenched rights because they allow the judiciary to strike down legislation, thus thwarting the expression of democratic will. Because McColgan views the judiciary as an essentially conservative institution, accountable to no one, she prefers to trust the legislature to protect the rights of disadvantaged groups. To demonstrate the soundness of her theory, McColgan compares the status of abortion in the US and Ireland, claiming that the backlash against the landmark 1973 US decision of *Roe v. Wade* has proven detrimental to women. Had the US opted for statutory rather than constitutional change, women might have had to wait longer for the right to control their procreative lives, but would have had a more secure status once the right was recognised. The 1992 Irish case of *X v. Attorney General* is used to illustrate the alternative approach; although abortion was absolutely prohibited in Ireland, the horror of forcing a 14 year-old victim of rape to return to Ireland from England to await the birth of an unwanted child led the country to modify its law.

The case is an odd one to use to demonstrate the superiority of statutory rights, since the individual's right to travel for an abortion was established by the Irish Supreme Court, based on the language of the Constitution. The legislative action McColgan alludes to took the form of a constitutional amendment that merely reinforced the judiciary's stance. The politicization of the abortion issue that McColgan finds so problematic in the US might have come about not because constitutional rights are inherently suspect but because, as many commentators have recognised, *Roe v. Wade* did not constitute the ideal test case. *X v. Attorney General*, with its innocent child victim, did. In addition, the US recognised the right to abortion relatively early, while Ireland did so only after most other Western nations had done so, and only to a very limited extent. Therefore, there are other reasons besides the constitutional-statutory dichotomy that would explain the differences in the two nations' approaches to abortion.

McColgan's distrust of the judiciary leads to other dubious arguments. For example, she claims that legislators in systems with entrenched rights

often pass laws that they know will be stricken by the courts as unconstitutional, since they believe that such tactics gain them credibility with conservative voters without alienating those of a more liberal bent. Again, this conclusion seems unwarranted, since liberal voters are not likely to forget their representatives' acts, symbolic or otherwise, merely because those acts have been judicially overruled. McColgan also fails to acknowledge that lawmakers in nations without entrenched rights may pass oppressive laws if they think their constituents want such laws; however, in those cases, those who are disadvantaged as a result are without a remedy. Again, *X v. Attorney General* suggests that constitutional regimes, even those that appear highly restrictive of certain rights, can be superior to statutory schemes, since the judiciary can step in to protect individuals when necessary.

The second reason why McColgan fails to persuade results from her forcing constitutional arguments where there are none. For example, she insists on analyzing whether the US Constitution offers any protection to women who want to raise a "battered woman" defence or who want to limit intensely personal and arguably irrelevant cross-examination in rape cases. Such an approach suggests either a misunderstanding of the US Constitution or the construction of a straw man argument, easily overcome in rebuttal. Constitutions are not meant to be comprehensive and do not necessarily bear on all situations. The cited examples cannot demonstrate the ills of entrenched systems of rights because they are not constitutional issues: they are instead matters of state criminal law and procedure.

The inappropriate application of constitutional law is troubling in a book that is intended to compare such systems of law to statutory regimes. While one expects (and indeed hopes) to find unusual arguments in a book of this sort, such arguments must be based on reasonable interpretations of existing law. Otherwise, they are too easily discounted. Fundamental errors about one of the primary jurisdictions under discussion (such as the claim that there are 52 US states when there are only 50) also do little to convince the reader of the author's point of view.

The third problem with this book is its failure to extrapolate its arguments about women to other disadvantaged groups. Although there are some references to ethnic and racial minorities in the discussion of affirmative action, there is no mention of what other groups might benefit from the author's analysis. Similarly, the author fails to tell the reader what areas of law other than reproduction, employment, and violence by and against women would benefit from her analysis. This omission is unfortunate, since the wider applicability of the study would have been one of its major benefits.

Despite these shortcomings, there is much in McColgan's book to recommend it. Her prose is fluid, her presentation of US and Canadian law, particularly regarding abortion, is extensive, and her arguments are clearly made. In fact, the author's ability to introduce such a large amount of information may work against her, for it gives the impression that she is cataloguing the laws in the various jurisdictions rather than comparing them. Indeed, the absence of a more rigorous comparative analysis of the two approaches leaves one with the sense that the most important work has yet to be done. Had the author been able to deliver what was promised, this book would have posed a powerful challenge to notions of human rights and constitutional protections as traditionally conceived.

Nevertheless, McColgan has produced a work that, while falling short of its goal, provides the reader with a great deal of information and considerable food for thought.

S.I. STRONG

*Practical Reason and Norms*. By JOSEPH RAZ. [Oxford: Oxford University Press. 1999. 177, (Postscript) 22, (Notes and References) 18, (Index) 3 pp. Paperback. £17.99 net. ISBN 0-19-826834-3.]

*Oxford Essays in Jurisprudence: Fourth Series*. Edited by JEREMY HORDER. [Oxford: Oxford University Press. 2000. ix, 263, (Index) 6 pp. Hardback. £45.00. ISBN 0-19-826858-0.]

THESE two books mark quite different stages in Oxonian jurisprudence during the second half of the twentieth century. The first edition of Joseph Raz's book, published in 1975, appeared in a decade when H.L.A. Hart was still productive and when some of Hart's former students (Raz, Ronald Dworkin, John Finnis, Neil MacCormick) published a number of important works. By contrast, the volume edited by Jeremy Horder has appeared eight years after Hart's death, at a juncture when most of Hart's prominent jurisprudential students are no longer at Oxford or are splitting their time between Oxford and other institutions. One striking feature of the fourth series of the *Oxford Essays in Jurisprudence* is that nine of the thirteen contributors are erstwhile rather than current Oxonians. A tenth contributor, John Finnis, divides his time between Oxford and the University of Notre Dame in Indiana. (To be sure, one of the nine ex-Oxonians John Gardner will return to Oxford in 2001.)

*Practical Reason and Norms* is unchanged from the second edition, which was published by the Princeton University Press in 1990 and which included for the first time a Postscript on the book's central idea of exclusionary reasons. Any serious reader should recognize the volume's rigor, sophistication, subtlety, and admirably ambitious sweep. It remains Raz's most impressive achievement. Although the present reviewer has elsewhere endeavored to show that a number of the book's central arguments are unsuccessful, the very forcefulness of those arguments is what makes them worthy of being sustainedly challenged.

One regrettable aspect of the second edition of *Practical Reason and Norms* is the shift in Raz's citational practice between 1975 and 1990. Whereas the main part of the book contains citations to numerous works on practical reason and related topics, the 1990 Postscript cites hardly any writings other than those of Raz himself. Though Hart was surely correct to maintain (in the Preface to *The Concept of Law*) that the development of jurisprudential thought cannot flourish if books on the subject are written primarily in order to encapsulate what other books contain, the work of Hart himself and of the early Raz is a testament to the fruitfulness of engaging directly with the writings and arguments of other scholars.

The fourth series of the *Oxford Essays in Jurisprudence* is a more modest undertaking than Raz's book, but on the whole it is a good volume. Most of the essays are thoughtful, careful, and lucid, though virtually every one of them is open to a number of objections (sometimes far-reaching objections). Because there is no room here to evaluate the essays one by one, and because it would be invidious to single out only a