

'Adventurous' judgments

A comparative exploration into human rights as a moral-political force in judicial law development

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Abstract

This article looks at the development of law by the judiciary in the sense of judgments taking the law beyond the point of what was hitherto regarded as *ius positivum*. Its main perspective, however, is not the creation of law by the courts as such, but rather the ways and means in which the human rights idea has encouraged judges to deliver decisions that imply an overturning of 'settled' law. In the comparative exploration of 'adventurous' judgments that we shall embark on, our focus will be on the *political morality of human rights* as a driving force in judicial activism. It is assumed, in other words, that where the judiciary is 'active', human rights may play a part as general principles of law as distinct from rules already incorporated in positive law. Notably then, human rights in this way affect positive law in a manner other than through processes of international, regional and national standard setting connected with the establishment of new supervisory institutions and mechanisms. For this reason, the article does not so much consider typical human rights cases; instead the focus is on major decisions by national courts that were not in the first place regarded as human rights cases at all. In this endeavour, the article aims to be no more than an initial comparative exploration, intended to illustrate a function of human rights that is not normally highlighted, namely its function as an inspirational force towards 'adventurous' judgments. Yet, the judicial potential illustrated here is of great significance, as it may lead to law development inspired by the two principal pillars underpinning the international quest for the realization of human rights: universality and human dignity. After reviewing a variety of characteristic cases from such diverse legal backgrounds as the United Kingdom, the Netherlands, the United States of America, India, South Africa and Nigeria, some conclusions are drawn as to the ways in which human rights may function as a moral-political force in judicial law development. Apparently, notions underlying human rights protection such as inalienability and universality play a part as modern *regulae iuris*, while interests that relate closely to basic human dignity tend to exert a rather strong appeal in terms of providing judicial protection.

Keywords

judicial activism; human rights; law-finding; comparative law

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