THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS, Tom Allen (University of Cambridge Press 2000).

REVIEWED BY

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Tom Allen's discussion of the right to property in Commonwealth constitutions is both extraordinarily wide in its scope and yet deeply embedded in the doctrinal debates over the place of property in the constitutional schemes of the broad range of jurisdictions that make up the Anglo-American legal universe. The great understated value of this study is its demonstration of the diversity of understandings and approaches to the constitutional protection of property rights as well as Allen's ability to draw out the common issues and links which give coherence to his project. This unity is of course neatly embodied in the shared common law heritage of these jurisdictions, which is the book's starting point, and the legacy of the jurisprudence of the Privy Council which provides a unique link between some of the central cases under consideration — such as the *Selangor Pilot Association*[1] and *Societe United Docks*[2] cases.

Beginning with the common law Allen claims that in the English system property is protected by two principles of fundamental law: that only parliament may authorize the compulsory acquisition of property, and may only do so in the public interest and upon payment of compensation.[3] While Allen argues that the principle of parliamentary sovereignty prevented the development of a justiciable right to property in England, he makes the interesting claim that the presumptions of statutory interpretation and compensation supported a 'right' to property "along the lines of the modern justiciable rights to property,"[4] despite the fact that Parliament had the power to explicitly preclude compensation. Having rooted constitutional property rights in the common law tradition Allen argues that these fundamental rules of English law found their way into the written constitutions of most Commonwealth states. Allen demonstrates this by discussing a series of commonwealth countries and their adoption of constitutional provisions for protecting property rights. Drawing from a range of specific models, including: Australia, India, and Nigeria, itself influenced by the European Convention in Human Rights, Allen shows how the idea of a fundamental bill

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1 Selanger Pilot Ass'n v. Gov't of Malaysia and Another [1978] A.C. 337 (P.C. Malay.).

2 Société United Docks and Others v. Government of Mauritius; Marine Wokers Union and Others v. Mauritius Marine Auth. [1985] 1A.C. 585; [1985] W.L.R. 114; [1985] L.R.C. (Const.) 801 (P.C. Mauritius).

3 TOM ALLEN, THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS 4 (2000).

4 *Id.* at 35.

of rights and property rights evolved within the commonwealth and how constitution-makers responded to these changing understandings. Significantly, however, Allen recognizes a distinction between the early formulations, such as the Government of Ireland Act of 1920 and even the post-colonial constitutions modeled on the Nigerian Bill of Rights, from those commonwealth constitutions which emerged from national processes of constitution-making, as most recently occurred in South Africa. Central to this distinction, he recognizes, is the unease over empowering the judiciary to review legislation exhibited by British drafters, as compared to the greater willingness of nationally controlled constitution-making processes to confer the power of judicial review on the courts.[5] Allen however fails to link this important insight to the history of decolonization and the relationship between the British drafters and the post-colonial constitutions they were helping to shape. Instead of suggesting that the changing role of the judiciary reflected in the attempts to protect property from post-colonial legislative majorities was merely a reflection of changing fashions and attitudes among the drafters, Allen might have considered what impact the concerns of settler and colonial interests might have had on these developments.

Turning to a discussion of constitutional interpretation Allen makes an important distinction between legalism which "dominated constitutional interpretation in most of the Commonwealth until the late 1970s"[6] and constitutional interpretation. Although Allen links the emergence of constitutional interpretation to the shift the Judicial Committee of the Privy Council makes from arguing that a constitution "should be interpreted by the same methods as an ordinary statute"[7] to the treatment of constitutions as sui generis instruments[8] requiring a 'purposive' and 'generous' interpretation,[9] he nevertheless argues that there has been very little impact on the "belief that judge-made values are the backdrop against which they must interpret the right to property."[10]

An important question that arises from this important insight is whether the reliance on common law values, particularly in the context of post-colonial constitutions, does not have the bizarre effect of valorizing the colonial period by rooting the interpretation of fundamental rights granted by post-colonial constitutions in the rights and values which undergirded the colonial world. In this way the history of colonial dispossession and

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5 *Id.* at 82.
6 *Id.* at 89.
7 *Id.* at 86.
8 *Id.* at 96.
9 *Id.* at 95.
10 *Id.* at 118.

exploitation is erased in the name of the fundamental rights of property recognized from time immemorial by the common law. This erasure of the role of law in the colonial project serves to deny the significance of the link between the adoption by post-colonial societies of written constitutions and the rise of an international human rights movement after World War II. The "common law" is thus transformed into a veritable garden of Eden, detached from its colonial encounter and transformed into an imaginary system of civilized rights, upheld since time immemorial. Gone is the common law's own historical development, from feudalism through the enclosure of the commons, and forgotten is the role of the common law in denying the property rights of indigenous peoples. This idealization of the common law is reflected too in the recent property jurisprudence of the United States Supreme Court in which Justice Scalia has argued that the right to property may only be constitutionally limited, without the duty to pay compensation, by those limitations, such as nuisance, that were originally recognized under the common law.[11]

Where Allen does recognize the tension between the recognition of property rights in post-colonial societies — which reflects the character of most commonwealth countries — he focuses on the issue of communal property and the impact of Locke's labor theory on the classification of indigenous rights as merely use and not ownership rights. Although he recognizes the consequences of this application of Lockean theory — including "the risk of oppression by colonial administrators and local rulers,"[12] he fails to reflect on the implications this understanding might have for the legitimacy of property rights in post-colonial societies. In this sense I was disappointed that Allen's doctrinal focus seems to have precluded a more through discussion of the *Mabo*[13] decision, especially the views of the justices who made connections between the denial of indigenous property rights and the coherence of claims to property under the modern law.

Although Allen does recognize that the right to property under commonwealth constitutions has been impacted by struggles over land reform and redistribution, especially the Indian experience,[14] he concludes that the eventual exclusion of the right to property from the Indian Constitution "plainly reduces the importance of the Indian law of constitutional property in the Commonwealth."[15] Instead, Allen limits his analysis of issues of redistribution to the discussion over the scope of "public purpose" and the

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[11] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030-31 (1992).
[12] ALLEN, *supra* note 1, at 151.
[13] Mabo v. Queensland (No. 2) (1992) 175 C.L.R. 1.
[14] ALLEN, *supra* note 1, at 49-53.
[15] *Id.* at 53.

debate in U.S. and commonwealth jurisprudence over whether the taking of property from one individual for the benefit of other individuals falls within the scope of the public interest. Allen draws an interesting comparison between the U.S. jurisprudence has exemplified by *Hawaii Housing Association v Midkiff*[16] and the Indian case of *Bihar v Singh*[17] which attempted to apply the notion that property could only be acquired by government for a public purpose — such as roads, hospitals, or other public needs. While he concludes that the public purpose and public interest requirements have now been read so broadly as to pose little hindrance to government redistribution efforts, Allen notes that the "fear of the framers of the United States Constitution that majoritarian governments would threaten economic and political stability has not materialized."[18] Instead, he concludes, the guarantee of compensation fully protects individuals from the state.[19]

A good part of the book is devoted to a careful analysis of different aspects of the constitutional protection of property rights. First, Allen enters into a discussion about the meaning of property which as he points out is rather central, for unless we know what property is we cannot know what is constitutionally protected. This leads Allen to describe two important distinctions. On the one hand, he distinguishes between "ordinary" or popular understandings of property and "legal" understandings of property assumed by lawyers. On the other hand, he makes the important distinction within the law between "legal" and "constitutional" property. It is this section of the book which highlights the important contribution Allen is making. His discussion ranges over different attributes of property -- possession, transferability, economic value -- to different forms of property: communal, corporate, customary and social in the form of welfare benefits. In concluding the chapter Allen notes that most judges would "probably describe constitutional property in terms of liberal property theory, where property is an area of personal autonomy given legal expression in terms of rights"[20] rather than obligations. Furthermore, constitutional property is implicitly considered by many judges to be "essentially the same as private property."[21] While Allen acknowledges that the South African Constitution "may operate as an independent source of rights, rather than merely a protection of private law rights,"[22] given the new constitutional order's goal "to free land and

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16 Hawaii Hous. Auth. V. Midkiff, 467 U.S. 229 (1984).

17 Bihar v. Singh A.I.R. 1952 S.C. 252.

18 ALLEN, *supra* note 1, at 211.

19 *Id.* at 212.

20 *Id.* at 161.

21 *Id.*

22 *Id.* at 153.

property distribution patterns from the shackles and restraints of apartheid,"[23] he nevertheless maintains his view that it is the private law notion of property rights that will hold sway among commonwealth judges.

Although "The Right to Property in Commonwealth Constitutions" makes an important contribution to a comparative understanding of property rights in a world where legal claims and standards are being rapidly globalized, the book will also be of great interest to judges, lawyers and students of law in the United States. While U.S. takings jurisprudence is notoriously indeterminate, its opaque quality is rendered more comprehensible in comparative perspective. Furthermore, the recent reliance on "common law" principles to guide our understanding of the takings clause of the United States Constitution may be viewed in a different light, when the common law's own constitutional trajectory in the protection of property is better understood by American jurists.

[23] *Id.* (quoting ANDRE J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSE: A COMPARATIVE ANALYSIS OF SECTION 25 OF THE SOUTH AFRICAN CONSTITUTION OF 1996 69 (1997).