

# Philosophy in Review

## BOOK REVIEW

**Alison Kesby.** *The Right to Have Rights: Citizenship, Humanity, and International Law.* Oxford University Press, 2012.

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**Alison Kesby.** *The Right to Have Rights: Citizenship, Humanity, and International Law.* Oxford University Press, 2012. 230 pp. \$120.00 USD (Hardcover ISBN 9780199600823).

International legal scholars, political philosophers and other scholars are often confronted with a number of problem-based questions. Such questions can be anything from those that require a high degree of abstraction to those pointing to certain categories of law to provide an answer. For example, take the question: ‘Who is the ‘human’ of international human rights law and what is the place in the world (in the sense of the protection and quality status) international human rights norms confer on the otherwise excluded such as undocumented migrants and the stateless within the state?’ There are numerous ways that one could answer this question, and as provocative as it may be, it is not merely a question for a single field such as law or philosophy to come up with an answer, rather, it will take a combination of two or more fields to adequately provide answers to this question. This is because such a question confronts the many problems that any question on human rights faces in these modern times.

Although the plethora of approaches and understanding of human rights itself often get lost in the number of available works, only few authors attempt to place the language of human rights in the context of citizenship, nationality and how both international law (via domestic law) and politics responds to the right to have rights. Alison Kesby is part of a minority league of authors who dare pursue the rights of the *rightless* in international law using the language of political philosophy. In the book—*The Right to Have Rights: Citizenship, Humanity, and International Law*—Kesby dissects the right to have rights against the backdrop of the disenfranchised who is either stateless, an asylum seeker, and the undocumented migrant who are all trying to enter or to assimilate themselves in a country other than that where they were born. Kesby believes that current law as applied by states to the vulnerable is one of exclusion and argues that it should be inclusive or creating pluralistic membership in society. Kesby questions whether human rights are merely the rights of the rightless or of those who already have rights, and as such meaningless.

Using Hannah Arendt’s articulation of a *right to rights* as a guide post and juxtaposed with the French philosopher Jacques Rancière’s writings, Kesby posits that states policies towards the vulnerable—in particular undocumented migrants—creates internal borders, containment policies for non-nationals, and in doing so demonstrates that there is a difference between nationality and citizenship. It is this theme which is at the heart of Kesby’s book, an examination of nationality and citizenship and how it affects the right to have rights, especially for undocumented migrants. Nationality, Kesby articulates is for ‘inter-state relationship,’ (p.43), as it ‘is the legal expression of social attachment’ (p. 41), whilst citizenship regulates the ‘individual-state relationship’ (p. 43). It is based on this reasoning that Kesby frames the undocumented migrant as the focus of the book, *i.e.*, the undocumented migrant’s right to have rights. This was evident in Kesby’s approach as she provides an analysis of two more interconnected themes to highlight the plight of undocumented migrants: their ‘place in the world’ and the undocumented migrant’s rights to humanity.

This approach allows Kesby to contextualize the right to have rights by undocumented migrants from both a political perspective and a legal perspective, where the latter explores the limitations of (international) human rights law and the former the paradoxes of human rights. Kesby examines a series of case laws to demonstrate how the right to have rights unfolds. The cases are a representative sample of the number of similar cases heard by various courts, particularly in developed nations

where undocumented migrants pursue their claim to *have* rights, whether as an asylum seeker, an illegal entrant or simply the right to humanity. This does not mean that the cases Kesby uses mean the book is a straight-jacket legal analysis. Kesby is creative and draws on political philosophy to interpret how such rights are to be interpreted.

Kesby is aware that what lurks in the background for vulnerable migrants is affected by politics. As examples of how a legal dispute can be caricatured as a political dispute in *Rancierian* language, Kesby uses instances such as the extraterritorial application of UK Immigration rules *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, a situation when the UK's Home Office opened up a pre-entry clearance post in the Czech Republic in 2004 presumably to stop Romas from entering and claiming asylum in the UK. Another example which Kesby relies on was the arrival of a man of Palestinian origin in Australia who was deemed to be stateless due to the lack of travel documents such as a passport (*Al-Kateb v Godwin*). Kesby captured such plights in a rights context as: 'the subjects of politics/of rights are the very people who lack the qualification and status to hold rights' (p. 121). In those situations, Rancierer could conceive them as expanding subjects of politics because their rights to asylum or settled refugees depends on finding a place in the world or having rights as Kesby postulates.

It is from the case law that the theme of the undocumented migrant and their right to have rights fully emerges. Whilst European Roma's may not necessarily be seen as undocumented, prior to the application of the EU free movement rules to the Czech Republic (and other East European countries), Romas were notoriously known for claiming asylum in different countries, but Kesby argued that such external borders that countries such as the UK employed only 'emplaced' non-nationals. The *Al-Kateb* case demonstrated more profoundly the right to have rights as an undocumented migrant and it here that Kesby argues that their vulnerability and powerlessness is partly derived from the absence of free movement. Kesby's emphasis on the undocumented (although not easily discerned by the untrained eye) ensures that their right to have rights are not merely exhausting the legal process in a state, but also *humanity* itself should ensure that humanity defends the rights of the undocumented as a being.

For Kesby international law is silent when it comes to the right to have rights of undocumented migrants. International law is silent because it 'retains the fiction that the place at which the border is experienced remains unified' (p. 35) in the case of external border control and containment processes. In the case of the stateless, international human rights law, Kelby notes 'points to the state as the community in which human rights are enjoyed and protected' (p. 55), whilst citizenship, on the other hand, 'cannibalizes humanity' (p.91) and denies the 'morally deficient' (p. 86) the right to have rights. If human rights are to be enjoyed based on citizenship, then the morally deficient are excluded in the eyes of 'international human rights law' that is 'premised on the indivisibility of human rights' (p. 87). For the undocumented to employ other avenues such as marriage to an *internal national* in order to enjoy human rights as a *citizen* he then needs permission from that state in the form of certificate of approval to marry. Kelby used *Baiai v Secretary of State (UK)* to connect all the different strands of the undocumented migrant journey's right to have rights and how 'international human rights norms may be harnessed to assert humanity as the guarantor of, and basis of entitlement to, rights' (p. 106).

Kesby's arguments looking into the undocumented in international law is, on the one hand, an intellectual challenge to the system of states that employs a double pronged approach to human rights

in the international system: welcoming the vulnerable but excluding those same vulnerable from any form of participation in the state. On the other hand, Kesby also demonstrates that states have not yet learnt from past atrocities where the vulnerable were once displaced and became stateless, and their right to have rights in contemporary times should not be based on race or country of origin. The latter, point Kesby articulated persuasively using Arendt and Ranciere to decipher the politics of rights.

Intriguingly, Kesby is neither defending nor indicting the system that enforces rights, Kesby is merely claiming that the undocumented—the *other*—should also enjoy those rights similar to citizens, in order for rights, those that the *system* defends for its citizens, be legitimate. Invoking Arendt and Ranciere to make the claim, Kesby sees the exclusion of the undocumented from participating in the system of rights as incompatible with the right to those rights. Although, throughout the book, Kesby used international (human rights) law to make her argument, she faced a more demanding problem: how can international law save itself, if it fails the undocumented? But it was Kesby's skillful deployment of Arendt and Ranciere approach to rights that provides some answers to the dilemma and she argues that there is a need to make legitimate *who* is the subject of rights.

Kesby's book is not a mere *tour-de-force* of the problematic nature of international human rights law, but also a book using political philosophy to expose the hidden hypocrisy in the current system of international human rights law. Readers are not taken on a path of philosophical abstraction but rather a concise understanding of Arendt's claim of the right to have rights, supplemented by Ranciere's depiction of the legal process as a political caricature.

This is a book that captures elegantly the plight of the undocumented and their quest to enjoy rights regardless of nationality, citizenship or the political squabbles in the state in which they are seeking to enjoy rights. What emerges from Kesby's book is that she creates a *middle boundary* in which the book is positioned at the intersection of political philosophy and international law so that the rights of the undocumented can be brought to light. To arrive at this middle boundary, Kesby was able to navigate both fields with awareness of the impact of one on the other to avoid any controversy or appearance of taking sides (whether it be for the undocumented or the state that defends rights).

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