The Right to Have Rights: Citizenship, Humanity, and International Law by Alison Kesby (2012) Oxford University Press, 192 pp ISBN 978-0-19-960082-3

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What does it mean to say that a person has a right to have rights: that they are able to claim a range of rights by virtue of a 'having' of a prior right, from which all right-bearing can be said to flow? This is the question that puzzles and animates Alison Kesby's recent monograph.[1] She seeks to unpack where this 'right to have rights' might be located (or placed) and what the implications might be for those 'emplaced' by this locating move. Kesby shows us the limits and possibilities of finding a right to have rights in four places: as the right to nationality; as citizenship; as humanity; and finally, the right to a politics of rights (in her words the 'having' of rights). Although she focuses on international human rights law, in each 'place' of having, she considers the borders and interrelationship of domestic law and (international) human rights law.

Through theoretical analyses, particularly of the work of Hannah Arendt and Jacques Rancière, and through case study application, Kesby demonstrates how each conception can have a totalising effect on the exercise of rights. For Arendt, citizenship is the necessary precondition for all right-bearing and it is this membership of political community that constitutes humanity. But Kesby argues that while citizenship may guarantee the right to have rights, citizenship itself becomes reified in the process, and we begin to lose sight of its limits and exclusions. Nowhere is this starker than in the case of prisoner and ex-felon disenfranchisement, an issue that aroused widespread debate in the 2012 United States elections because of its strong racial overtones. Kesby illustrates how the stripping away of aspects of 'belonging' — whether through deviancy and disenfranchisement, or through social exclusion, poverty and race — leaves the subject of rights 'rightless'.

Kesby similarly identifies a series of problems that arise if we take nationality as the 'giver' of rights. In international law there is a customary legal duty imposed upon states to permit entry and prevent expulsion of their nationals. So far, so good for the national, but this has a significant impact on stateless people, who are not accorded the consequent rights to enter or reside in the territory of state parties to, for instance, the 1954 *Convention relating to the Status of Stateless Persons*,[2] or other international human rights instruments. The place in the world conferred by the right to nationality leaves 'unplaced' the stateless. But

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

2 *Convention relating to the Status of Stateless Persons*, adopted 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

that's not all. Kesby demonstrates how nationality is about more than simply entry and residence; that it actually encompasses a range of conceptualisations — from 'thin', formal conception, to the notion of substantive membership. As the conception of nationality travels along this spectrum, it reorients itself in relation to humanity and citizenship. The danger that Kesby identifies is that the national becomes *the* subject of rights, subsuming the human or the citizen into nationality.

Kesby's later analysis of the right to have rights as humanity has particular significance in the Australian context. She demonstrates vividly the problem that faces the deportable alien when they come into contact with the border between national law and international human rights law. She argues that in the now infamous case of *Al-Kateb v Godwin*[3] we see how national law determines who has the right to protection from indefinite detention, unconstrained by international human rights norms that appear to provide protection against such a state of affairs. In *Al-Kateb*, the majority of the High Court determined that as an 'unlawful non-citizen' the authorities were obligated under the *Migration Act 1958* (Cth) to remove Mr Al-Kateb and that pending that removal, he could be detained. It did not appear to matter that this might be for the length of Mr Al-Kateb's life, the authorities being unable to conceive of any real likelihood that he could be removed in the future, given his status as a stateless Palestinian who had no right of return and would not be accepted in a third country. Here, Mr Al-Kateb's 'humanity' deriving from international human rights law was displaced by statutory interpretation. He could not rely on his humanity in the absence of nationality or citizenship to demand protection from indefinite detention.

In her analysis of the politics of human rights, Kesby revisits *Al-Kateb*, providing an alternative lens through which right-bearing might be conceived. Mr Al-Kateb may have been subject to indefinite detention through the majority reasoning, but his articulation of his 'having' rights demanded recognition, shifting the boundaries and changing the place of having. This is according to Rancière's work, which argues that it is in that lack — the denial of rights — that rights are in fact held, contested and borne. This is a claim as to the site of right-bearing as well as a claim about recognition: belonging by having a 'place'. The fall-out from *Al-Kateb* could provide some support for Rancière's claim. Eventually, Mr Al-Kateb was granted a visa, and his case reinvigorated calls for an Australian Bill of Rights. But the outcome also highlights precisely Kesby's argument about the limits of this approach. For one thing, the visa granted to Mr Al-Kateb stated that his state of nationality was 'Kuwait',[4] a poignant reminder of the exclusionary effect of being, in fact, stateless. For another, the 'debate' about 'boat people' retains high visibility, while these people are made consistently more and more invisible by their emplacement 'outside' Australia. Kesby's words have a striking and tragic resonance in the Australian context: '"humanity" is an unmoored lifeboat in which the shipwrecked can be cast adrift'.[5]

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3 *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

4 David Marr, 'Escape from a Life in Limbo', *The Sydney Morning Herald* (online) 27 October 2007, <http://www.smh.com.au/articles/2007/10/26/1192941339538.html>.

5 Kesby, above n 1, 116.

Two recent decisions, one of the United Kingdom Supreme Court (*R(ST) v Home Secretary*)[6] and the other handed down by the High Court of Australia (*M47/2012 v Director General of Security*),[7] demonstrate the continuing importance of Kesby's study. In *R(ST)* the Supreme Court considered the meaning of the word 'lawfully' contained in art 32 of the *Convention relating to the Status of Refugees*,[8] in order to determine whether an Eritrean appellant adjudged to have the status of refugee could nevertheless be removed pending the grant of a right to remain in the United Kingdom. Lord Hope stated that, even if interpreted generously and purposively, art 32 required presence to be lawful before an individual could seek its wider protection against expulsion.[9] This dictum was the subject of discussion in the more recent High Court case of *M47*, finding approval where the issue of art 32 was aired. In *M47* the plaintiff, a Sri Lankan national, had applied for and been denied a protection visa. While he was recognised as a refugee, the Australian Security Intelligence Organisation ('ASIO') had assessed him as a risk to security and he remained in detention (having been detained since December 2009).

It should be conceded at the outset that the discussion of art 32 in *M47* was the subject only of Gummow and Bell JJ's reasoning, and further, the issue was not the subject of the majority reasoning because the case was decided on different grounds.[10] But it complicates the notion that *Al-Kateb* illustrates how domestic law often trumps international human rights law when the two are interfaced. Is it not also the case that the exclusion from humanity is contained within international human rights instruments themselves, by their reference to being 'lawfully' in place? It is not so much 'deference' to domestic law, as it is a fundamental feature of international human rights law. Further, the minority judgment of Gleeson CJ in *Al-Kateb* (and its approval by Gummow and Bell JJ in *M47*) appears to articulate a notion of humanity through 'the principle of legality' and habeas corpus. What I suggest, in necessarily truncated form, is that perhaps this domestic-international boundary is not as clear as suggested by Kesby in her analysis of *Al-Kateb*. Having said that, this suggestion is taken up in other parts of the study and she repeatedly acknowledges the 'fuzzy' boundaries. The study is, also, focused squarely on international human rights law, so the interesting question of how domestically-

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6 *R(ST) v Home Secretary* [2012] 2 WLR 735 ('*R(ST)*').

7 *M47/2012 v Director General of Security* (2012) 292 ALR 243 ('*M47*').

8 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) The text of art 32 states the following in relation to 'expulsion': 'The Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order.' This is to be compared with the more limited protection from 'refoulement' in art 33: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

9 *R(ST)* [2012] 2 WLR 735, 747–8 (Lord Hope).

10 In *M47*, the majority held that *Al-Kateb* did not need to be revisited because the issue of whether or not the plaintiff could be indefinitely detained did not arise, either because the question did not fall to be considered (it was superseded by the overriding question of whether ASIO's assessment was ultra vires — which it was so determined) or because there remained possibilities as to potential receiving countries (therefore not raising the issue of indefinite detention because removal remained reasonably likely). See *M47* (2012) 292 ALR 243.

grounded principles articulate a language of 'humanity' is perhaps an interest for another day.

The morphing border between domestic law and international human rights law remains an intriguing puzzle and one which clearly animates this study. The morphing qualities, too, of the conceptions of the right to have rights also remain somewhat out of reach. Although the structure of the book works, there are times when conceptions appear to fuse together, when nationality and citizenship are discussed interchangeably, or when concepts don not seem to retain their contiguity, particularly in relation to 'humanity'. But this is partly due to the problem of naming itself: in drawing from articulations of concepts such as nationality, citizenship and humanity, Kesby is demanding greater clarity from these existing concepts, in order to reveal their limits and opaque qualities.

Ultimately, the interrogation of these four places of the right to have rights leads Kesby to question — but not entirely reject — the 'naming' effort to pin down *the* right to have rights. Instead she invites us to see the right to have rights as a 'delegitimating gesture': it ought to bring into relief the inadequacy of any given 'place' and prevent the reduction of right-bearing into any definitive place. The point is that if we settle for the right to have rights as any one particular notion, we cannot help but exclude those at the borderlands of each: the 'contained' undesirable non-national; the undocumented migrant; the disenfranchised prisoner (or ex-felon); the deportable alien. As she says 'no one positive determination of, and basis for, right-bearing … can bear the weight of the right to have rights without collateral exclusionary damage'.[11] The book is rich in detail and genuinely illuminating, demanding that we reflect upon the dangers of 'trumps' that cannibalise all else, and instead search for an authentic politics *for* human rights.

[11] Kesby, above n 1, 144.