

# BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS

This collection of essays draws together innovative scholars to examine the relationship between two legal and political phenomena: the shrinking of the state as a monopoly of power in favour of the expansion of power over individuals in private hands, and the change in the nature of rights. The authors expertly discuss the implications of the changing boundaries of state power, the legal responses to this development, its application to human rights and re-conceptualizations of public life as obligations are handed over to private hands. This innovative book deals with an important set of problems and offers a fresh perspective of different legal themes in an integrated fashion.

TSVI KAHANA is Associate Professor at Queen's University, Toronto.

ANAT SCOLNICOV is Professor of Law at the University of Winchester.



**More Information** 

## BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS

Human Rights, Private Actors, and Positive Obligations

Edited by
TSVI KAHANA
ANAT SCOLNICOV





### **CAMBRIDGE**UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781107066502

© Cambridge University Press 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication Data

Names: Kahana, Tsvi, 1967– editor. | Scolnicov, Anat, editor.

Title: Boundaries of state, boundaries of rights: human rights, private actors, and positive obligations / edited by Tsvi Kahana and Anat Scolnicov.

Description: Cambridge, United Kingdom: Cambridge University Press, 2016. |

Includes papers presented at a conference held in Cambridge, England in 2011.–ECIP Introduction. | Includes bibliographical references and index.

Identifiers: LCCN 2015050948 | ISBN 9781107066502 (Hardback)

Subjects: LCSH: Human rights-Congresses. | Liability for human rights violations-Congresses. |

Privatization-Law and legislation-Congresses. | State action (Civil rights)-Congresses.

Classification: LCC K3239.8 .B68 2016 | DDC 341.4/8-dc23 LC record available at http://lccn.loc.gov/2015050948

ISBN 978-1-107-06650-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.



Dedicated to the memory of my father Samuel Scolnicov. AS



CONTENTS

List of contributors	ix
----------------------	----

Introduction 1

TSVI KAHANA AND ANAT SCOLNICOV

1 Our rights, but whose duties? Re-conceptualizing rights in the era of globalization 6

JEAN THOMAS

2 On suffering and societal constitutionalism: at the border of international investment arbitration and human rights 25

DAVID SCHNEIDERMAN

3 Beware: boundary crossings 43

JOSÉ E. ALVAREZ

4 Dialogue and constitutional duty 94

MARK TUSHNET

5 Positive obligations, positive rights, and constitutional amendment 109

VICKI C. JACKSON

6 Privatizing public rights: common law and state action in the United States 129

HELEN HERSHKOFF

7 Abdications of sovereignty in state action and horizontal effect jurisprudence 149

JOHAN VAN DER WALT

8 Hybrid state accountability and hybrid rights: positive rights, exclusion, and state action in Canada 173

vii



viii

### TABLE OF CONTENTS

9 Human rights and derivative rights: the European Convention on Human Rights and the rights of corporations 194

ANAT SCOLNICOV

10 Judicial review and *Human Rights Act* review in contracted-out public services: options for litigation in English law 215

A.C.L. DAVIES

11 Privatization and human rights in the United Kingdom 233

STEPHANIE PALMER

12 Principles of public fiduciary administration 251

PAUL B. MILLER

13 Human rights indicators and boundaries of accountability and opportunity 271

MEGAN DERSNAH AND RON LEVI

Bibliography 290 Index 324



CONTRIBUTORS

JOSÉ E. ALVAREZ, Herbert and Rose Rubin Professor of International Law, New York University School of Law.

A.C.L. DAVIES, Professor of Law and Public Policy, University of Oxford; Garrick Fellow and Tutor in Law, Brasenose College, Oxford.

MEGAN DERSNAH, PhD candidate, Political Science, University of Toronto.

HELEN HERSHKOFF, Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University School of Law.

VICKI C. JACKSON, Thurgood Marshall Professor of Constitutional Law, Harvard Law School.

TSVI KAHANA, Associate Professor, Queen's University Faculty of Law.

RON LEVI, George Ignatieff Chair of Peace and Conflict Studies; Associate Professor, Munk School of Global Affairs and Department of Sociology, University of Toronto.

PAUL B. MILLER, Associate Professor, McGill University Faculty of Law.

STEPHANIE PALMER, University Senior Lecturer, University of Cambridge Faculty of Law.

DAVID SCHNEIDERMAN, Professor of Law and Political Science, University of Toronto Faculty of Law.

ANAT SCOLNICOV, Professor of Law, University of Winchester.

ix



x

Cambridge University Press 978-1-107-06650-2 — Boundaries of State, Boundaries of Rights Edited by Tsvi Kahana , Anat Scolnicov Frontmatter More Information

LIST OF CONTRIBUTORS

JEAN THOMAS, Assistant Professor, Queen's University Faculty of Law.

MARK TUSHNET, William Nelson Cromwell Professor of Law, Harvard Law School.

JOHAN VAN DER WALT, Professor of Philosophy of Law, University of Luxembourg.