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978-1-108-42657-2 — Legislated Rights

Grégoire Webber , Paul Yowell , Richard Ekins , Maris Köpcke , Bradley W. Miller , Francisco J. Urbina  
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## LEGISLATED RIGHTS

The important aspects of human wellbeing outlined in human rights instruments and constitutional bills of rights can only be adequately secured as and when they are rendered the object of specific rights and corresponding duties. It is often assumed that the main responsibility for specifying the content of such genuine rights lies with courts. *Legislated Rights: Securing Human Rights through Legislation* argues against this assumption, by showing how legislatures can and should be at the centre of the practice of human rights. This jointly authored book explores how and why legislatures, being strategically placed within a system of positive law, can help realise human rights through modes of protection that courts cannot provide by way of judicial review.

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# Legislated Rights

SECURING HUMAN RIGHTS THROUGH LEGISLATION

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University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781108426572](http://www.cambridge.org/9781108426572)

DOI: 10.1017/9781108551069

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First published 2018

Printed in the United States of America by Sheridan Books, Inc.

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

*Library of Congress Cataloging-in-Publication Data*

Names: Webber, Grégoire C. N. (Grégoire Charles N.), author.

Title: Legislated rights : securing human rights through legislation / Grégoire Webber [and 5 others].

Description: New York : Cambridge University Press, 2018. | Includes bibliographical references and index.

Identifiers: LCCN 2017058819 | ISBN 9781108426572 (hardback)

Subjects: LCSH: Human rights. | Legislation.

Classification: LCC K3240 .L4455 2018 | DDC 342.08/5—dc23 LC record available at <https://lccn.loc.gov/2017058819>

ISBN 978-1-108-42657-2 Hardback

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## Contents

<i>Preface</i>	<i>page</i> vii
<i>Acknowledgements</i>	ix
<i>Note on the Cover Image</i>	xi
<b>1 Introduction: Securing Human Rights through Legislation</b>	<b>1</b>
<b>2 Rights and Persons</b>	<b>27</b>
<b>3 Why It Takes Law to Realise Human Rights</b>	<b>55</b>
<b>4 Legislation as Reasoned Action</b>	<b>86</b>
<b>5 From Universal Rights to Legislated Rights</b>	<b>116</b>
<b>6 How Legislation Aids Human Rights Adjudication</b>	<b>153</b>
<b>7 Majoritarianism and Pathologies of Judicial Review</b>	<b>181</b>
<i>Index</i>	201

## Preface

This book explores the moral value of legislation and its capacity to realise human rights. It articulates the special role and responsibility of the legislature in securing human rights in positive law. Our title, *Legislated Rights*, signals a contrast to the theory and practice of much contemporary human rights law, which privileges the judiciary as the principal defender of human rights. We aim to shift the key premises of debate in human rights law, where it is regularly assumed that human rights are the special province of the courts and that legislation represents a threat rather than a means of protecting them.

The chief value of the Universal Declaration of Human Rights, the European Convention on Human Rights, and similar treaties and domestic bills of rights lies not in providing standards for courts to enforce against political authorities, but rather in articulating the aspects of human wellbeing that should be actively pursued and promoted by *all* authorities responsible for a community. Among those authorities, we contend, legislatures have the central and strategic role in realising human rights. Many aspects of human wellbeing identified in rights instruments can be adequately advanced only through general measures adopted through legislative action. Law's point, we argue, is to bring human rights into being in a political community.

Our argument aims to make a contribution to the fields of jurisprudence, constitutional theory, and human rights law. It does so with special attention to institutions. We argue that much human rights law and theory proceeds without a sound account of right ordering between institutions and their proper functioning. We seek to recover the insight of Hersch Lauterpacht, who drafted the International Bill of the Rights of Man (a forerunner to the Universal Declaration) from a viewpoint that embraced the legislative specification of rights, arguing that the details of the substantive law that safeguards rights, such as liberty of the person, equality before the law, and freedom of association, are regularly found in ordinary legislation.

In seeking to recover such an approach, this book offers a theoretical understanding of human rights law, understood as human rights in the legal practice of the European and Commonwealth courts. This area of legal practice is wider than philosophical accounts that focus on the idea of human rights as those possessed ‘simply in virtue of being human’ or on a minimal core the violation of which could justify intervention by other states in the affairs of the infringing state. The Universal Declaration, European Convention, and similar instruments cover an extensive, ambitious range of issues going well beyond such a narrow core. Our aim is to counter widespread misunderstandings about the nature of rights and to describe a method for providing more secure legal protection for human rights.

This book consists of six chapters and an introduction. Although each substantive chapter has a different author, the chapters individually and collectively pursue the book’s central argument. They are intended to stand together, not like the chapters of an edited collection united by a set of related themes, but like the chapters of a single-authored monograph. For this reason, while each chapter specifies an author, the book as a whole is jointly authored.

*Grégoire Webber and Paul Yowell*

## Acknowledgements

This book grew out of two workshops held in Oxford on the theme of how legislation secures human rights. Following the first, in which original drafts were discussed, we sought to bring the contributions into a single argument, as a jointly authored book, and tested that proposal at the second workshop. The process of revising chapter drafts benefited from the careful study and incisive commentary of several workshop participants and other colleagues; at the risk of omission, we signal our special thanks to Nick Barber, Paul Brady, Graham Buitenhuis, Dominic Burbidge, Denis Chang, Fernando Contreras, Grant Huscroft, Sulman Iqbal, Jeff King, Randy Kozel, Martin Luteràn, Adam MacLeod, Jeff Pojanowski, Gil-Ad Schwartz, Jan van zyl Smit, Leah Trueblood, Charlie Webb, Jacob Weinrib, and Angela Wu.

Finola O'Sullivan and John Berger at Cambridge University Press set a high standard for professionalism and we signal our gratitude to them and their colleagues. We also acknowledge the financial support of the Canada Research Chair program, the Conicyt Fondecyt Iniciacion N° 11150872 grant of the Chilean Ministry of Education, and the Programme for the Foundations of Law and Constitutional Government in the University of Oxford.

Bradley W. Miller's contribution was completed prior to his judicial appointment and he wishes to thank Grégoire Webber and Paul Yowell for subsequent minor editorial changes to his chapter prior to publication.

A copy of Thomas Somerscales' *Antiguo Muelle de Valparaíso* (1882) was provided for the book's cover image by the Museo de Bellas Artes de Valparaíso, Palacio Baburizza. We acknowledge and thank them for this courtesy.

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We reserve a special note of acknowledgement for John Finnis. He has helped shape the ideas in this book in many ways: first, as the supervisor of each of our doctoral theses, from which emerged many of the main claims in the book; second, as an active participant in each of the two workshops that gave direction to this project; and third, as a ready voice of encouragement throughout this project's development. We dedicate this book to him.

## Note on the Cover Image

Thomas Somerscales' *Antiguo Muelle de Valparaíso* (1882) depicts a moment when Valparaíso, Chile, was the leading sea port in South America and one of the continent's wealthiest cities. The artist's vision of the harmony of civilisation and nature, and of the varied but organised human activity that creates prosperity and beauty, represents a condition that is not realistically possible to achieve without the order that can be brought about by the Rule of Law and in particular *legislated rights*. No human project is immune to the ruptures of nature, however, and in 1906 an earthquake destroyed the buildings in the painting and much of the infrastructure of Valparaíso, resulting in the deaths of around 4,000 inhabitants. The combined effects of the quake and the opening of the Panama Canal in 1914 meant that Valparaíso never regained its turn-of-the-century prominence, and much activity and commerce was transferred inland to Santiago. But Valparaíso was rebuilt and remains a vibrant city, and its historic quarter is a UNESCO world heritage site.

In 2015, a public presentation of chapters in this book took place in Chile, at the Pontifical Catholic University in Santiago. While later touring Valparaíso, we experienced an 8.3-magnitude earthquake that struck the region. Tsunami warnings resulted in the precautionary evacuation of roughly one million people. The lives of many, including those in or in proximity to high-rises, were saved by legislated measures imposing strict building code standards and a coordinated emergency response strategy. It is tragic that fifteen people are reported to have lost their lives as a result of the earthquake – one in Valparaíso and most others in locations where it seems that modern codes have not been implemented. It is a testament to the relationship between the right to life and positive, legislated measures that the number of casualties was no higher.

*Grégoire Webber and Paul Yowell*