

Book reviews

The Constitution of Law: Legality in a Time of Emergency

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‘Freedom is the right to tell people what they do not want to hear.’ (George Orwell)

The real threat to the life of the nation, in the sense of people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. This is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.¹

Introduction

Feeling safe does not seem to go hand in hand with liberty. An important balancing exercise ensues when steps are taken by the state to respond to a perceived threat to national security and, at the same time, ensure that in acting in the interests of society to answer these threats, basic civil liberties are not undermined. Concerning this delicate and fraught process, Gross and Ni Aoláin aptly observe:

‘Balancing – taking into consideration the threats, dangers, and risks that need to be met, the probability of their occurrence, and the costs for society and its members of meeting those risks in different ways – may be thus heavily biased, even when applied with the best of intentions.’ (2007, p. 74)

Developments since 9/11 have resulted in the systematic modification of laws by governments keen to respond to terrorism and which take discretionary forms of executive powers. In the United Kingdom and the United States, for example, a series of laws, pre-emptive in nature and, as such, highly problematic, have been passed by legislatures and challenged in the courts.²

Scholars are once again compelled to ponder the questions concerning the law and its legitimacy. Viewing these questions as integral to the rule of law and democracy, they are especially concerned with recent government action that seemingly rejects the values of the rule of law and that simultaneously raises doubts about the nature of democracy (Scheuerman, 2006). Yet, the ‘relationship between the rule of law and democracy is asymmetrical: the rule of law can exist without democracy, but democracy needs the rule of law, for otherwise democratically established laws may be eviscerated at the stage of application by not being followed’ (Tamanaha, 2004: 37).

David Dyzenhaus’s work is all about assembling the pieces of this jigsaw puzzle together. Whether writing about the South African experience, or emergency provisions and the unwritten constitution, he is a meticulous scholar who revisits the main theories in public law as he discusses key cases and critiques judicial reasoning relating to emergency powers (Dyzenhaus, 1999). Dyzenhaus is not impressed by half-hearted judicial commitment to the rule of law. In this recent publication, *The Constitution of Law*, he painstakingly scrutinises a government’s accountability when responding to emergencies and terrorism. Dyzenhaus is not dismissive of judicial responsibility in this response. He revives and draws our attention to the Hobbesian notion of a judge who is sensitive to dangers when the rule of law, which ‘secures the fabric of civil society, is under strain’ (2007, p. 12, my emphasis).

1 Lord Hoffmann, *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, at 97.

2 For a UK perspective see ss. 24–31 of the Anti-Terrorism, Crime and Security Act 2001, which was considered in the *Belmarsh* case, *A v. Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335, [2005] 2 WLR 87. For the US perspective see s. 213 of the 2001 US Patriot Act, in particular the ‘sneak and peak’ provisions. See also *Rasul v. Bush* 542 US (2004).

On this point, Gearty's work in the area informs Dyzenhaus's. Gearty correctly identifies three critical paradoxes that lie at the heart of this strain, namely: national security, democracy and political violence. One of the reasons for the tension is the 'misuse of language in our political culture' (2007, p. 111). Terrorism, for example, has been, and continues to be, an uncertain term. This ambiguity and the 'creative exploitation' of the paradoxes allow for measures to be adopted that are 'exceptional and unprecedented [...] to defend [the nation]' (p. 119). As a civil libertarian, Gearty is especially eager to maintain the 'emancipatory and radical nature of civil liberties', urging us to embrace the democratic developments of the twentieth century, and recall our commitment to the rule of law and human rights (p. 111).

Dyzenhaus is especially preoccupied with 'legal spaces' and 'legal controls'. He identifies black holes which comprise a space absent legal controls and grey holes which constitute a space in which there are legal controls, but they are inadequate. Grey holes provide a semblance of legality and give government a basis to argue that it is still governing in accordance with the rule of law. It is the grey holes that worry Dyzenhaus most. They are, he says, black in substance and, therefore, even more dangerous for the rule of law than black holes. For Dyzenhaus, therefore, the objective is to discover ways out of the grey holes: 'ways of responding to terror in ways that break out of this insecurity-heightening, democracy-corroding spiral' (Loader and Walker, 2007, p. 90). Throughout, Dyzenhaus refers to the 'rule-of-law' project, in which judges play a key role and make their commitments explicit.

To appreciate Dyzenhaus's concerns, this essay revisits the notion of an 'open society', which emerged in 1989 with the collapse of Communist political structures in the Eastern bloc. Immense changes in both western and, in particular, central and eastern Europe, revived questions about the highly contested notion of the rule of law. Indeed, it was the abuses inherent in 'closed societies' or totalitarian regimes which were the foundations of the open society. This does, of course, ask us to bear in mind the context within which developments take place. Inspiration in post-1989 Europe was taken from European and international developments, as well as from more established democracies. It is worthwhile to remind ourselves of the sources of the catalysts which make the rule of law meaningful. Exploring further Dyzenhaus's notion of the unwritten constitution, the essay examines the concept of the 'invisible constitution'.

This notion was first introduced by the energetic and far-reaching efforts of post-Communist courts, and is one that provides useful insight into Dyzenhaus's well-researched, engaging and prescient work.

Open society

The idea of an 'open society' is one that is strongly connected to the rule of law. 'Open society' specifically refers to liberal democracies that are tolerant and that adopt transparent and flexible political measures. Popper, writing in 1945, defined an open society as one in which political leaders can be overthrown without the need for bloodshed (1945/1995). Significantly, the distinction between an open and closed society rested with the recognition of the role of responsibility and accountability for personal choices. Popper was referring to clear violations of civil liberties and freedoms that occurred in a 'closed society', or totalitarian regime. At the heart of the legal system that was imposed on Communist states was fear. 'Fear was the first principle buttressing Soviet-style control. A key to communist societies' stability was the well-internalised fear of the party-state and its seemingly omnipresent security forces' (Loś 2002, p. 169).

In a closed society, liberty does not rank very high when compared to security. Laws are instrumental, far from static, and their arbitrary application ensures that society feels their reach in both public and private lives. Some features of the totalitarian regime support the use of terror for achieving the long-term goal of eliminating any political opposition to the state order. For the post-Communist world, the agreement that human rights should be protected unconditionally was accompanied by selected models of rule of law from more established democracies. Although later criticised for being naive, one could find little fault with the passion, enthusiasm and belief in that a judiciary which boasts 'confidence in the men and women who administer the judicial system that is the true backbone of the rule of law' could be created (Scheppelle, 2000).³ It is not in the scope of this essay to examine the complexities of judicial systems in transition, suffice it to say that 'Communist ideas, patterns of behaviour and institutions still pervade constitutional developments' (Sajó, 1995, p. 253). Equally, Dyzenhaus also draws on similar experiences, namely the South African one, to demonstrate that judges in both open and closed societies have an obligation to the rule-of-law project. The judge in an open society

3 Even it seems, after a 'bad' decision. See *Bush v. Gore* 121 US 525, 539 (2000) (Stevens, J., dissenting), at the US Supreme Court site at www.supremecourtus.gov (28 June 2007).

should be sensitive to the project at all times, none more so than in times of political instability.

Fear also is, unfortunately, a dreadful feature of our open society. In an extreme form of insecurity, anxiety and vulnerability we feel impotent and helpless. Our helplessness hinders us from finding those solutions that 'could allow our politics to be lifted to the level where power has already settled, so enabling us to recapture and repossess control over forces shaping our shared condition' and defining the variety of choices and boundaries to our freedom (Baumann, 2006, p. 128). This is a particular concern for civil libertarians, who find that '[a] tranquil state rooted in fear is not a free society' (Gearty, 2007, p. 119). Baumann notes:

'If the idea of an "open society" originally stood for the self-determination of a free society proud of its openness, it now brings to most minds the terrifying experience of heteronomous, vulnerable populations overwhelmed by forces they neither control nor truly understand, horrified by their own undefendability and obsessed with security of their borders and of the population inside them – since it is precisely the security *inside* borders and *of* borders that eludes their grasp and seems bound to stay beyond their reach forever.'

(Baumann, 2006, pp. 96–97).

In an attempt to address our fears we naturally turn to the state to maintain law and order. Accompanying the fear that affects liberal democracies is the challenge that states undertake new and unusual methods to discipline and punish. Following 9/11, the concern related to these unique measures increased, causing certain scholars to question political motives, and pondering whether 'we currently allow practices that go against their original meaning' (Kateb, 2006, p. 47). In a similar vein, Baumann observes that the 'plight of 'stranger', cast and held in disturbingly underdefined 'grey zone' stretching between declared enemies and trusted friends, has been at all times ambivalence incarnate' (2006, p. 126).⁴ However, it is equally important to note that for some scholars, such as Richardson, there are doubts concerning 'a great evolutionary leap in September 2001, that the human race suddenly produced a new brand of evildoers' (2006, p. 13, my emphasis).

Terrorism is not a new phenomenon; governments through time have had to create legal responses to violent movements within their borders. 'We must always remember, however, that terrorists cannot derail our democracy by planting a bomb in our midst. Our democracy can be derailed only if we conclude that it is inadequate to protect us' (p. 280).

The crux of the question rests with essence of the regime itself. The separation of powers and judicial review are two mechanisms to ensure government responsibility. These mechanisms have been critically analysed by scholars of public law, seeking an answer about the controlling national power. Tushnet (2005), for example, rejects both mechanisms, while others in the area painstakingly analyse key case law to reveal judicial commitment to the constitutive elements of the legal authority, exploring the manner in which precedent allows judges to rise to challenges to the rule of law (Scheppelle, 2000; Scheurman, 2006).

Dyzenhaus reveals a different problematic that is not isolated to the United Kingdom or the Commonwealth. It is the claim that since 9/11 we have moved into a state of permanent emergency and have abandoned or are slowly abandoning the rule of law. As noted above, tension between national security interests and protecting civil liberties can be identified in many states' histories at different points in time. Ironically, our open society is experiencing a crisis with the very issues that comprise its beginnings. It is equally ironic that comparisons are drawn with the experiences that constitute the inception of the open society. Paradoxically, while we live in an open society, it is seemingly threatened by fear. And because the fear is not entirely tangible, it appears even more menacing and more demanding of a solution.

Those living in the most developed countries are living in the most secure societies which ever existed, yet at the same time we reveal obsessions about security-related issues, linked to anxiety and fear (Baumann, 2006, p. 101). Polls taken after the 9/11 and London terrorist attacks support this contention. 'True to its name, the paramount weapon of terrorism is sowing terror' (p. 107). It is asserted that we are dealing with a different kind of terrorism, one that is 'new' and has a 'more ominous face [. . .] in Europe' (Baumann, 2006, p. 108; Cowell and Bonner, 2007).⁵ Counter-terrorist

4 For example, concerning the United States, the Council on American-Islamic Relations (CAIR) released a report recently that outlines 2,467 incidents and experiences of anti-Muslim violence, discrimination and harassment in 2006, the highest number of civil rights cases ever recorded in the Washington-based group's report. See the full report (of its kind) at www.cair.com/pdf/2007-Civil-Rights-Report.pdf.

5 The recent attack on Glasgow airport has provoked remarks reported by the US and British press, referring to the 'psychotic thought processes behind the attack', or 'it is clear a loose but deadly network of interlinked operational cells has developed' (Cowell and Bonner, 2007).

measures are 'openly and blatantly desecularized version[s] of the totalitarian temptations that accompanied the whole of modern history, being tested with particular zeal and to most spectacular effect by the communist and fascist movements of the century that has just drawn to its close' (Baumann, 2006, p. 115). As pointed out by Gross and Ni Aoláin, '[t]he rush to legislate means that it is not unusual that when emergency legislation is initially adopted, no meaningful debates over it take place' (2007, p. 72). All of this seems to paint a gloomy picture indeed, especially when we consider Rosen's observation that we are not very good at digesting complicated information, making us more impatient to make good decisions about complex issues (2004, p. 15). This is particularly relevant when we are driven by a 'psychology of fear' (p. 14). Thus, in the current context, our rush to apprehend terrorists and prevent future terrorist attacks has meant that our respective governments have taken far-reaching steps that potentially violate fundamental rights and freedoms and call into question the balancing exercise between national security and the protection of civil liberties.

The future of the open society

In maintaining law and order, it is clear that the state may decide to introduce and impose extraordinary measures. For some, liberal democracies are always in a state of vulnerability to this inevitable development. Carl Schmitt, writing in the early twentieth century, reflected on events in Weimar Germany (1919–1933), and argued that traditional political and legal thought does not address the problem of exception, which is composed of an extreme danger to the existing political and legal order. Schmitt's work comprises an important part of Dyzenhaus's critique (and others working in the area) of legal spaces. For Schmitt, it is not clear what measures should be taken, but what is clear is that not every legal norm can foresee, let alone contain, what measure might be required. Schmitt found liberal-minded proponents of this form of government naive (1922).

It is easy to forget that under the 1919 Weimar constitution constitutional rights were not entrenched. Discussions relating to constitutional rights occurred within a different context, led by positivists who stressed the idea of the 'people' rather than the individual (Fuzer, 2004, p. 135). This meant that the:

'German people's sovereignty was always present in the electorate's votes in plebiscites, in parliamentary

and presidential elections, outlining the contours of a parliament in which a vast legislative and executive powers were to combine and which only a few "checks and balances" were to counter.'

(Fuzer, 2004, p. 135)

In contrast, during this time, and in response to developments in Weimar Germany, Kelsen went further with his positivism, or the 'pure theory of law', where the freedom of the people, as part of the state, was most important of all. The application of any norms beyond legal and positive ones was out of the question. Not surprisingly, natural law interpretations were rejected. As Dyzenhaus notes, 'the state is totally constituted by law' (2007, p. 199), so when a political entity acts outside the law, its acts cannot be attributed to the state and they have no authority. Interestingly, Schmitt, when writing about constitutional rights, held two different positions in the course of developing his ideas. While he expanded on the political dimension of constitutions early on in his career, at the centre of his argument basic rights and liberties could be found. 'Restriction of the individual's freedom could only occur as an exception and even then it had to happen in an assessable manner' (Fuzer, 2004, p. 208). He would later change his stance to accommodate the new political situation.

Equally, it is easy to overlook the fact that one of the most important developments in the twentieth century concerns international law and the role of the international community. Most constitutions have provisions on states of emergency that also protect civil liberties and require constant parliamentary review of related executive decisions (Scheppele, 2004). This is not to deny that questions continue to plague the purported limitations of the rule of law and the reach of the law in controlling emergency powers. If we attempt to find solutions at the European level, we are disappointed. In most cases, the European Court of Human Rights has left the question of emergency provisions to the states under the margin of appreciation.⁶

Scheppele convincingly argues that we need to note the historical and material circumstances that existed in Weimar Germany, which resulted in the failure of weak parliamentary democracies, not only in Germany, but throughout continental Europe – which do not exist in the present day. If we pursue this further and examine events during times of stability, we discover that 'emergency powers are in fact more interesting, politically more revealing and more

6 Most cases concern Article 5 (personal liberty) of the European Convention on Human Rights. See, for example, *Leander v. Sweden* [1987] 9 EHRR 443 and *Brogan v. United Kingdom* [1989] 11 EHRR 117.

analytically challenging when considered in periods of “peace”, and the everyday functioning of civil society’ (Neocleous, 2006, p. 95). Many examples can be found in UK and US experiences with emergency provisions during peacetime. This alternative critique introduces another perspective with which to view the legal spaces that have been identified by scholars working the area. Prior to 9/11 most terrorist offences were dealt with by US federal criminal law; this meant that terrorist suspects were handled by the institutions that formed part of the ordinary criminal justice system. In the United Kingdom, the treatment of IRA suspects has been long criticised along the lines of creating a separate criminal law framework to deal with the ‘suspect community’ (Hillyard, 1995). The recognition and critique of these developments warns against the temptation to discard or dismiss the ‘rule-of-law’ project.

Invisible constitution

As noted above, Dyzenhaus supports the view of a judge taking the role of a ‘weather forecaster’. He constructs a framework for this role after carefully examining cases from various common law jurisdictions to demonstrate that the law provides a moral foundation for it. He alleges inconsistency in adhering to a strict application of the separation of powers or a principle of legality that asks parliament to ‘confront what it is doing and accept the political cost’⁷, saying that it reveals further divisions concerning the value of equality as it pertains to citizens and non-citizens. We see evidence of the truth of his allegation in Canadian and Australian approaches which divulge equally alarming developments.⁸ For Dyzenhaus, principles derived from lesser-known cases can provide a precedent for future commitment to the ‘rule-of-law project’, especially when judicial uncertainty and weakness are identified. His analysis of the *Belmarsh* decision⁹ is an excellent example of how judges have failed in their commitment despite holding the provisions in question unconstitutional. This is one of the most critically engaging chapters of Dyzenhaus’s book.

Dyzenhaus’s unwavering position related to the commitment of all three branches of government to the rule of law resonates with developments in the post-Communist world. The former Hungarian

Constitutional Court president, Laszlo Sólyom, wrote that ‘[o]f all constitutional principles, the rule of law played a special, symbolic role: it represented the essence of the system change, being the watershed between the nondemocratic, nonconstitutional, socialist system and the new constitutional democracy’ (Scheppelle, 2000; Sólyom and Brunner, 1999). Sólyom refers to the Hungarian experience, where legal continuity and legal certainty guided the transition (and can be a blueprint for developments in the region). It could be argued that for Dyzenhaus, such enthusiasm and commitment to the rule of law complements his idea of the rule-of-law project. He argues that his:

‘conception of the rule of law is a rather bare common law one, enriched by the way in which such a conception has to be updated, most recently because of the central place taken by an international and domestic discourse of human rights in our thinking about law.’ (2007, p.13)

The continental legal model that exists in post-Communist states has experienced a similar inspiration. Contrary to some views, Hungarian courts have not ‘gone mad and forgotten wise counsel that the law should be stable and uncertain, that judicial review should be used sparingly, that overconstitutionalisation of law may be too much of a good thing’ (Scheppelle, 2000). The most novel way that this has emerged has taken the form of the ‘invisible constitution’, which first arose in post-Communist Hungary. This is not an idea that is necessarily rooted in positive law, rather, it refers to the constitutional framework that the Hungarian Constitutional Court has developed without speaking about a ‘system of values’ (Sólyom and Brunner, 1999, p. 5). Owing to important historical reasons, the Hungarian Constitution eliminated all ideological references. Incorporating a similar approach to German courts, the Hungarian Court’s post-1989 jurisprudence, in the protection of constitutional rights, refers to the principle of legality and continuity of law as a ‘revolution under the rule of law’ (Sólyom and Brunner, 1999). In other words, it is this guiding principle that holds together the case law of the Court and the rule of law. The most powerful example of this can be found in the Court’s reasoning in the case in which the death penalty was

7 Lord Hoffmann in *R v. Secretary for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131.

8 See *Suresh v. Canada* [2002] 1 SCR 3 and *Al-Kateb v. Godwin* [2004] 208 ALR 124. The Canadian Supreme Court has been both hailed and criticised. A further reading reveals a commitment to the prohibition of torture but ultimately an immigration policy that falls short of international standards (see Okafor and Okoronkwo, 2003).

9 *A v. Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335, [2005] 2 WLR 87.

abolished.¹⁰ This landmark case lucidly argues that the human right to dignity is another key to the hidden constitution. Despite being the source of controversy, perceived by the Hungarian parliament as judicial activism and clear encroachment on the legislative and executive branches of power, the Court persevered in constructing a constitutional framework that offers a reliable and timeless standard. It adopted the Italian Constitutional Court's notion of the 'living law', where the Court, when reviewing the content of the norm, reviews the 'meaning and the content that can be attributed to it from the consistent and unitary practice of applying the law' (Sólyom and Brunner, 1999, p. 4).

Overall, the constitution viewed in its entirety is the starting point. In the Hungarian experience, the Court's case law explains the theoretical bases of the Constitution and of the rights included in it in order to form a coherent system with its decisions. The construction of the 'invisible constitution' provides a reliable standard of constitutionality beyond the Constitution, and answers attempts to amend the document out of political interests. Such a coherent system, it is understood, does not conflict with a new document to be established at any point in the future. The Constitutional Court enjoys the freedom in this process, as long as it remains within the framework of the concept of constitutionality (Scheppelle, 2006).

Concluding remarks

Ultimately, Dyzenhaus's work concerns judges, and their responsibility – constitutional duty – to uphold the rule of law, especially when there are indications that the government is withdrawing from the rule-of-law project. His earlier work on South Africa (in fact Dyzenhaus went before the Truth and Reconciliation Commission to argue that judges were accountable for the facilitation of secrecy and arbitrariness that characterised the apartheid system) challenges us with questions found at the core of political philosophy when he dissects the Truth and Reconciliation Commission. He adopts a similar approach in his recent work.

His commitment resonates with the creation of the open society. Perhaps some lessons can be learned from revisiting the values upon which the open society was created, when thinking about the current context in which law and its legitimacy are discussed. For Hungary and other states, 'there is a good deal of improvisation whenever the musicians find the score unpleasant' (Sajó, 1995, p. 267) that should challenge more established

democracies. While Dyzenhaus convincingly demonstrates that responsibility need not be lost in times of emergency, in order effectively to answer and address the challenge of terrorism, it is important not to ignore the context within which the law operates, as well as that within which terrorism operates. As noted above, terrorism will only fade when its sociopolitical roots are destroyed, not by the punitive measures that are imposed (Baumann, 2006, p. 109). Likewise, scholars of terrorism, such as Crenshaw, note that the 'study of terrorism still lacks the foundation of extensive primary data based on interviews and life histories of individuals engaged in terrorism' (2000, p. 405). Recently, this point has been taken up by Campbell and Connolly, whose sociolegal-based research on Northern Ireland reveals that the law plays a key role in the repression and mobilisation of violent challenges to the state and, interestingly, demonstrates how a legal challenge can exist in a grey zone (2006). The rule-of-law project – the invisible constitution – ensures that unconstitutionality does not go unnoticed (Sajó, 1995), even when meeting seemingly good intentions defined by national security interests, recalling principles related to a legal culture and legal consciousness peculiar to our civil society. 'It is we the people's dedication to a culture of legality that is the guardian of the constitution' (Dyzenhaus, 2007, p. 233).

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10 Decision 23/1990 (31 October 1990). For an English translation see Sólyom (2000).

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Who Believes in Human Rights? Reflections on the European Convention

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The idea of human rights stands at a crossroads. On the one hand, the language of rights has never been so popular. Civil society organisations constantly hoist the banner of human rights in their campaigns, while international organisations refer relentlessly to the central importance of rights in their work. Legal instruments that attempt to encapsulate and give binding force to human rights have become integral elements of most legal systems. Academics and activists consistently try to expand the reach and scope of rights approaches: initially conceived as a narrow set of minimal guarantees to protect core human liberties, the language of rights have now become a conceptual framework for articulating a vast range of normative claims. Socioeconomic rights, equality rights, children's rights, cultural rights and other new varieties of 'rightsspeak' have all emerged in recent decades, and have flourished across the globe. Human rights appear to be the progressive ideology of choice for our times.

However, on the other hand, human rights face new and growing political challenges, especially since

the events of 9/11. Many Western governments, partial cheerleaders for human rights during the Cold War, have begun to kick against the constraints which human rights instruments impose on their freedom of action. Ironically, some Western governments also increasingly use the language of human rights to justify actions, such as the Iraq invasion, which rights activists often bitterly oppose.¹ This development reflects the ever-increasing salience of human rights ideals, but also demonstrates the existence of real conflict and disagreement about their substance. In addition, some states, such as Russia, increasingly indicate a willingness to reject or repudiate the human rights package. Fundamentalist religious ideologies challenge the universalist and Enlightenment-rooted assumptions underlying most contemporary accounts of rights. The predominance of neoliberal ideologies and increasing commodification of social goods since 1989 has denied political oxygen to some of the narratives of human solidarity out of which elements of the human rights idea originally grew. In other words, just as the ideology of human rights attains significant new levels of impact and support, it is attracting a backlash. New debates have broken out as to who can speak in the name of rights, and how the integrity of human rights ideals can be maintained in the midst of this uncertainty.²

The three books all reviewed here engage with these issues in different ways. Gearty's *Can Human Rights Survive?* is a collection of essays that were originally presented as the 2005 Hamlyn Lectures. This volume is an ambitious undertaking, and a considerable contribution to the great tradition of Hamlyn papers. In the first chapter, Gearty attempts to identify what, if any, common, shared understanding can underpin the idea of human rights in what he calls the current 'crisis of authority', where foundational or metaphysical accounts of human values have largely succumbed to withering critique. He argues that a 'Darwinian' sense of shared human compassion is perhaps the only solid basis on which human rights ideals can rest (pp. 40–50).³

Gearty then proceeds in the rest of the book to examine how the 'legalisation' of rights (i.e. their conversion into judicially enforceable legal norms) and the incorporation of the language of rights within the

current discourse of 'national security' pose a serious threat to the emancipatory potential of the human rights idea. He sees human rights as beleaguered, resting on shaky normative foundations and facing a life-threatening crisis in the form of the current 'War on Terror'. This book attempts to explore how this 'Esperanto of the virtuous' can survive and thrive despite these threats, via the re-emphasising of the emancipatory, participatory and ultimately compassionate roots of the idea of human rights. In general, this volume represents perhaps Gearty's finest work: he returns to old and familiar themes that have recurred throughout his work, such as the dangers of the legalisation of rights and the rhetoric of counter-terrorism, but his analysis has deepened and become more nuanced.

Dembour, in *Who Believes in Human Rights?*, also engages with some of these themes, except that her focus is primarily on the application of the rights norms contained in the European Convention on Human Rights (ECHR) by the European Court of Human Rights (hereafter 'the Strasbourg court') in its case-law. Her admirably clear and focused introduction makes it clear that she shares Gearty's scepticism about the existence of any basis of 'universal universality' on which to rest the normative foundations of human rights ideas. However, her approach differs from that of Gearty, in that Dembour does not attempt to find any substitute basis for rights ideology. She maintains a degree of suspicion about the entire package of human rights ideals, while accepting their potential usefulness as a form of rhetoric and persuasion. She explores some of the major 'classical critiques' of human rights ideology and applies these critiques to how rights are institutionalised and protected via the case-law of the Strasbourg court. Dembour concludes that many of these critiques, including the realist, radical feminist, utilitarian, Marxist and 'particularist'/anti-universalist perspectives, have considerable validity when applied to the Strasbourg jurisprudence. The human rights case-law of the Court is riddled with normative gaps, uncertainties and multiple instances where human rights law does not deliver on its emancipatory potential.

Dembour moves on from this conclusion to discuss the normative and ethical limits of rights jurisprudence, and against this background she analyses human rights scholarship and how it defines the idea of rights and

1 See the controversial views of Michael Ignatieff on the justifiability of extreme measures in certain circumstances to combat terrorism, in Ignatieff (2004). See also Conor Gearty's attack on Ignatieff in response: Gearty (2005). Gearty develops this criticism of Ignatieff's views in Chapters 4 and 5 of *Can Human Rights Survive?*

2 See Douzinas (2000).

3 For a similar attempt to locate an alternative 'universal' basis for human rights, this time involving a 'commitment to the rights of strangers', see Langlois (2003).

responds to these limitations. For her, four 'schools' of human rights scholarship can be identified: the 'natural' scholars, who see rights as inherent and 'given'; 'deliberative' scholars, who see rights as agreed norms settled by a process of social and political debate; 'protest' scholars, who see rights as ideals to be fought for; and 'discourse' scholars, who see rights as indeterminate norms that are consistently in the process of being formulated and discussed. In a very interesting analysis, Dembour proceeds to examine the interrelationship between these different approaches to human rights. For her, an approach based on 'human rights nihilism' and linked to the 'discourse' school is ultimately preferential: human rights may be useful as a 'system of persuasion', but they are ultimately contested norms with limited effect that are rooted in particular subjective assumptions, and which do not rest on any firm normative foundation (pp. 274–75).

The final book is less ambitious in its philosophical ambitions than the first two, but no less interesting for that. Greer in *The European Convention on Human Rights: Achievements, Problems and Prospects* sets out to examine the track record of the ECHR, its limits, successes and achievements, as well as the evolving role of the Strasbourg court. He argues that the purpose of the Convention has changed: established at the beginning of the Cold War to serve as a statement of basic shared Western European values in response to Communist authoritarianism, it has morphed into an 'abstract constitutional model' for the European continent as a whole, setting out a range of normative standards which public institutions across Europe must strive to meet.

While more upbeat in his assessment of what the Convention has achieved than is Dembour, Greer shows that the ECHR's enforcement machinery, and in particular the Strasbourg court, has struggled to adjust to its changed role. He examines how the shift to a constitutional role has impacted upon the jurisprudence and interpretative approach of the Court, but also how the growing case-load has imposed intolerable burdens on the functioning of the Court and has not been matched by adjustments to the Convention's barely adequate machinery for ensuring state compliance. Greer concludes this outstanding book by suggesting that this new 'constitutional' role for the Court is here to stay: therefore, he suggests that considerable adjustments need to be made to the admissibility rules, practice and procedure and functioning of the Court, as well as to the (currently very

limited) relationship between the Strasbourg institutions and national human rights bodies.

Greer's concerns are therefore more specific and narrower than those of Gearty and even Dembour, who also concentrates upon the Strasbourg jurisprudence but uses it for the purposes of her theoretical arguments as a representative example of an institution applying human rights standards. However, all three books make substantial contributions to the existing literature. All three are excellent pieces of human rights scholarship: each in their own way will constitute important points of reference for some time to come. They also have the immense virtue of being well-written, clear and accessible: arguments are made with punch and style, with the Gearty and Dembour books being particularly readable and engaging.

Indeed, from the perspective of a student, all three books strike the happy balance of combining rigorous argument with clear exposition. For academics, these books also have a welcome willingness to take controversial positions. Greer breaks ranks with much NGO opinion in questioning whether the right of individual petition to the Strasbourg court should remain open to all potential litigants. He suggests that this is now untenable given the volume of the Court's case-load: instead, the Court needs to be able to act as a constitutional court in selecting significant cases while rejecting others that are more appropriately dealt with elsewhere, a position which with I agree. Gearty reiterates his oft-expressed scepticism about the legalisation of rights and is not afraid to highlight the very problematic distinction between terrorism and political violence. Dembour assaults sacred cows left, right and centre: her challenge to foundationalist accounts of rights, while not altogether new,⁴ is bracing, well-argued and refreshingly nuanced. She also brings anthropological and philosophical perspectives to bear in her analysis that are often overlooked in contemporary human rights scholarship, including the always interesting work of Guy Haarscher.⁵ Her book is also notable for her use of personal experience and individual examples to highlight the real people behind the statistics of inadmissibility decisions and other court determinations.

As ever, there are parts of all three books that could have been expanded, or better developed. I would have liked to see Gearty take forward the idea of human rights being founded on a Darwinian sense of compassion, and apply this to other contexts apart from

4 See e.g. the discussion in Gaete (1993); see also Douzinas (2000); Baxi (2002).

5 See e.g. Haarscher (1993); Haarscher and Fyrdman (2002).

his usual safe terrain of the legalisation of rights and national security. How, for example, could this idea be applied in the context of socioeconomic rights? However, the format of the Hamlyn lectures perhaps precluded this, and we may have to wait for subsequent works. Dembour could perhaps have developed her concept of 'rights nihilism' a little: does it differ very much from Rorty's pragmatic scepticism, despite its roots in Nietzsche's subjectivism? Much of Greer's text has already seen the light of day in article form: this means that some of the separate chapters are largely self-contained and adhere to the framework of their progenitor articles. This means that in places overarching ideas are not as fully developed as perhaps ideally they would be: for example, I would have liked to see more on the 'abstract constitutional role' the Strasbourg court is now playing. Greer argues that its functions increasingly mirror the constitutional review conducted by the US Supreme Court and German Constitutional Court. I tend to agree with him, but can the often Delphic and case-specific findings of the Court play a similar role as the more tangible norm-setting role of national constitutional courts? Does Strasbourg ultimately have the authority and legitimacy to play such a role?

However, pointing out how arguments could or should have been developed further is the luxury of the reviewer: all three books may not be perfectly complete, but all generate ideas, fresh insights and new perspectives of real value. What then can we take from these useful pieces of human rights scholarship? Given the simultaneous position of strength and weakness that human rights find themselves in at present, as outlined in the opening paragraphs of this review, do the arguments made in these books stand up? Do they offer a coherent account of where human rights ideas find themselves now, and where they might find themselves in ten or twenty years' time?

At the time of the drafting of the Universal Declaration in 1948 and the subsequent UN human rights treaties of the 1960s and 1970s, human rights texts were the product of a cross-cultural, cross-national dialogue: they were intended to serve as a statement of agreed shared values that could unite a divided world in agreement on certain basic minimal entitlements. For their framers, they perhaps were never meant to be anything else. However, with the revigoration of natural law philosophies in the wake of World War II, and the

highly influential work by Rawls, Dworkin and others which gave new and vibrant life to liberal political philosophy, the human rights idea seemed to encapsulate and give concrete shape to these exciting new normative currents. Even philosophical perspectives rooted in more critical traditions, such as Habermasian 'discourse theory',⁶ Derridian deconstructionism and Foucaultian post-structuralism, have a tendency to reach for concepts rooted in the human rights tradition when it comes to outlining a positive agenda of progressive change.⁷ Gearty exaggerates when he says that human rights have become a new 'secular religion': however, as I have suggested above, it has replaced socialism and other ideologies as the progressive doctrine *de jour*. However, in an era apparently dominated by post-modern critique on the one hand, and a return to the easy certainties of total religious belief on the other, does the human rights idea rest on solid normative foundations? Or is it essentially hollow in nature, and therefore vulnerable to its abuse, misappropriation and rejection?

Gearty and Dembour both share the belief that 'grand narrative' universalist theories of rights cannot stand up to post-modernist critique. Gearty, however, argues that his concept of 'Darwarian universalism', which is predicated upon the existence of a shared sense of compassion, can step into the normative gap: in the alternative, at least the lowest common denominator of this idea of human compassion can provide a common point of agreement for all who wish to come under the human rights umbrella. This is an attractive idea, and is well developed in *Can Human Rights Survive?* However, can the vague and uncertain concept of compassion really provide the idea of human rights with enough normative clarity?

Compassion is a vague and imprecise emotion, and it will often be unclear what compassion for the underdog actually requires. Conflicting stances on many issues can readily be justified by citing compassionate impulses. The invasion of Iraq, the detention without trial of alleged terrorists, access to abortion or the rights of defendants within a criminal justice system are all examples: in each case, 'compassion' can be used as a justification for almost any stance that one wants to adopt. However, it cannot by itself give human rights the hard and clear definition that is required, if the idea of rights is to give firm normative guidance on difficult and controversial questions. More is needed.

6 The roots of much of Habermas's theoretical framework lies in the critical thought of the Frankfurt School; see McCarthy (1979).

7 See for example the indirect affirmation of certain human rights concepts in Derrida (2001). See also the interesting discussion in Lindgren (2000).

I would suggest that when human rights arguments are deployed to push for governments to adopt or to avoid a particular course of action, much of their normative and emotional appeal lies in their claim to combine both compassion and rationality in a coherent package. If one for example argues for greater respect for the human rights of asylum seekers, one is arguing (a) for more compassionate treatment, but also (b) for treatment that is founded on a more coherent set of moral principles than that currently being inflicted. Human rights claims are more than emotional appeals to the good nature or conscience of government: they contain a morally rationalist component, as well as an emotive dimension.

This claim to contain a rational dimension, embodied in legal requirements such as the proportionality test, gives added force to rights arguments. This rational component is also relied upon to define what course of action best complies with rights standards, and to give precision to human rights claims that mere appeals to compassion lack. However, this appeal to rational principles means that rights claims invariably place some reliance upon the very Enlightenment-rooted philosophical constructs that Gearty suggests lack authority in the post-modern era. As a result, I am sceptical whether the human rights edifice can be built up from Gearty's compassion principle alone.

Indeed, Dembour is sceptical about the existence of any objective normative foundation for rights ideology, hence her 'rights nihilism'. Indeed, she is sceptical about the idea of human rights in general, seeing its primary value as a useful rhetorical tool to be deployed where appropriate for progressive ends. She bases her scepticism on her extensive critique of the case-law of the Strasbourg court. Dembour makes a questionable logical jump here, moving from identifying the limits and gaps of the Strasbourg jurisprudence to a wider philosophical critique of the human rights idea in general. The deficiencies of the Strasbourg jurisprudence may give rise to questions about the usefulness of institutionalising rights via a legal framework. However, it does not necessarily indict the human rights idea itself, which is of course separable and often much more capable of having an emancipatory impact outside of legal

frameworks.⁸ In other words, Dembour relies too much on a critique of a specific legal framework in making a wider case about human rights thinking in general. Nevertheless, her critique of human rights ideology has considerable force, especially since the aim of much of the human rights movement is to embed rights in legal structures such as the ECHR. However, if Dembour is correct in arguing that the human rights idea is devoid of real objective normative force, then can it be sustained in the face of competing ideologies?

Dembour focuses on predominantly 'progressive' critiques of rights, but notably absent from her analysis are the challenges that are made against human rights by conservative, fundamentalist or authoritarian critics of rights. These perspectives are notable for their absence from most academic analysis, but in practice are often politically very potent. At the heart of these critiques usually lies an assertion of subjective values at the expense of what is usually presented as a false or hollow cosmopolitan universalism: the needs of a particular national group, or a particular belief, or a particular 'way of life' are presented as more deserving of protection than universal rights norms. The post-modern critical embrace of subjectivity finds an uncomfortable echo in these conservative assaults upon rights values.⁹

If Dembour's 'human rights nihilism' is the position to which the 'crisis of authority' has led us, there may be a price to be paid if the human rights project can no longer be credibly seen as articulating objective norms of universal validity. Why should the 'discourse' of human rights command any more respect than the particularist discourses of nationality, religion, culture, values and even race? If the idea of human rights becomes just one more ideology, then it may lose its 'aura' of normative superiority. This is perhaps why Gearty wishes to find some basis for the human rights ideal in the idea of human compassion. Dembour is less concerned about this prospect, welcoming greater normative scepticism about rights. However, it remains to be seen whether the appeal of human rights ideology can survive the potential loss of its 'aura'.

This potential loss of 'aura' could also afflict the delicate and somewhat precarious structure of international human rights institutions. Even well-established

8 See Meckled-Garcia and Cali (2005). Dembour contributes an interesting chapter to this excellent collection.

9 Conservative commentators have been very slow to use the rhetoric and conceptual armoury of post-modernism to challenge human rights ideology, mainly because 'mainstream' conservative thinkers tend to reject many of the tenets of post-modernism, in particular in the Anglo-American sphere. However, over the last decade, nationalist and hard-right commentators now increasingly use the language of value scepticism and some of the tropes of post-modernist thought to critique what they see as false cosmopolitan universalism. See Antonio (2000); see also the discussion of the writings of Alain De Benoist in Griffin (2000). For an analysis of the relationship between post-modernism and Islamist fundamentalist thought, see Sardar (1997).

human rights institutions such as the ECHR and its enforcement machinery remain vulnerable to political winds. If the human rights ideal were to become tarnished, or become one more ideology amongst many, the status and prestige of the Strasbourg mechanisms will increasingly be exposed to new challenges. This is already happening: the European Court of Human Rights is coming under new forms of political pressure, especially from Western European governments concerned about the terrorist threat¹⁰ and from Russia's increasingly overt hostility to the Strasbourg institutions. In addition, the Strasbourg court is to an extent a victim of its own success: as Greer discusses, with its huge case-load, the Court is buckling under the strain of living up to the expectations that it has successfully generated over the last two decades. Taken together, these factors combine to create an increasingly turbulent climate for the Court, notwithstanding its status as one of the more respected and effective human rights institutions in the world.

This should be a source of concern to those well disposed towards the human rights ideal, even if only in a qualified and provisional way. Dembour's critique of the Court makes too much of the inevitable compromises, caution and judicial tentativeness that come with the legalisation of rights via a judicial (or any other) framework. She herself notes that the European Court of Human Rights has been a valuable agent for progressive change. Human rights institutions will inevitably disappoint, to some extent. However, they are essential for infusing human rights concepts into the bloodstream of mainstream legal and political discourse. Greer's book is invaluable in discussing the ways in which the Strasbourg court has achieved some success in achieving this gradual transfusion over the last few decades, and in exploring how this relative success can be maintained and followed though. However, it may be that the future of the Court may depend as much on the ideology of human rights maintaining its current 'aura' as on the institutional dynamics that Greer discusses. In other words, the current difficulties that the Court finds itself in are linked to the wider issues affecting human rights, a dimension that perhaps Greer underplays in his otherwise excellent analysis.

The idea of human rights has reached its current salience in an era of accelerating neoliberalism, post-modern erosion of attempts to construct universalist normative projects, and the apparent resurgence of particularist alternative ideologies. Some of the current appeal of human rights ideology may stem from how rights thinking is both linked to these trends and yet also is opposed to them in interesting and complex ways. The human rights idea can accommodate a wide diversity of different philosophical viewpoints, as Dembour shows. It gives expression to common human needs and bonds, as Gearty argues. The institutions established to protect rights may have the capacity to adopt and change over time, as Greer illustrates. However, in the final analysis, human rights may be inextricably intertwined with the Enlightenment project, which may prove to be an inherent strength or considerable weakness in the years ahead.¹¹

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10 See the intervention by the UK government in the ECHR case of *Ramzy v. The Netherlands*, Application No 25424/05 to argue for a loosening of the requirements of Article 3 ECHR, which prohibits deportation of non-nationals back to countries where they may face a 'real risk' of torture. See also the speech by John Reid MP (then Home Secretary) calling for a change of approach by the Strasbourg court in cases relating to national security: BBC Online, 'Reid Urges Human Rights Shake-Up', 12 May 2007. Note also Russia remains the only country to have refused to ratify Protocol 14 ECHR, which is intended to improve and speed up the Court's procedures: without Russian ratification, the Protocol cannot come into effect.

11 This is why the attempt by Habermas to retrieve the Enlightenment tradition and the 'project of modernity' from the post-modernist critique remains relevant for the human rights movement; see Habermas (1990).

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