

Civil Rights and Security

David Dyzenhaus, editor
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Book review by Sally Ramage

This volume is part of Ashgate's International library of essays on rights and it is worthy of analysis in these troubled times. Its 464 pages contain eleven chapters of writings by eleven eminent experts, namely, Jeremy Waldron, Eric A. Posner, Bruce Ackerman, David Cole, Sunstein R. Cass, Lucia Zedner, Ken Roach, Clive Walker, Neal Katyal, Klaus Gunther and Ian Loader. The theme of this volume is the relationship between rights and counter-terrorism policy. However, the editor reminds the reader that, although it is a preoccupation with the West, terrorism is not the major cause of insecurity for much of the rest of the world, and this has led to much study of terrorism and especially of the relationship between security and human rights.

Chapter 2, by Eric Posner and Adrian Vermeule, develops the idea that of institutional control and is interesting in that they prescribe Carl Schmitt's philosophy. Carl Schmitt during the Nazi years, held the view during the Weimar Republic that 'the executive is best placed to decide both when a situation requiring a tradeoff in security exists and how that tradeoff is to be made'. Controversially, and contrary to established legal doctrine, they advocate no judicial check on the executive's determination. Eric Posner¹ and Adrian Vermeule suggest that in times of emergency, courts 'should defer even to free-standing executive policies that restrict civil liberties to promote greater gains in security or that target dissenters or racial and ethnic minorities on the same grounds, since the cost of judicial reviews² is said to rise sharply in times of emergency, because wrong judicial invalidation of new security policies can produce large harms'. Even today, on 12 February 2012, a state of emergency was declared in Montenegro due to severe weather conditions in most parts of the country. 'Pursuant to the decision of the Security and Defence Council on the state of emergency, the Emergency Management Coordination Team, tasked to manage the protection and rescue during a state of an emergency, has passed directions signed by Prime Minister Igor Lukšić, the Team administrator.'³

Chapters 3 to 9 take the stance of institutions and their views on security and rights. Institutional models are analysed: emergency constitutionalism; weak constitutionalism; strong constitutionalism. Many of these authors veer toward a return of the liberal political philosophy of such classical thinkers as Kant,⁴ Hobbes⁵, Locke⁶ and Montesquieu⁷ and overall, the spirit of the book is towards well-resourced, intense state intervention.

In chapter 4, David Cole⁸ examines the priority of morality, and wrote in a most outspoken way of his ideas on unsuccessfulness of preventive detention. The United States 'Palmer Raids' occurred when the U.S.

¹ Kirkland & Ellis Professor of Law and Aaron Director Research Scholar at Chicago Law School. See Posner, . and Jack Goldsmith 2005) *The limits of International Law*, Oxford: Oxford University Press.

² Judicial review is a means by which the courts can supervise bodies, which exercise public functions to ensure that they are acting both lawfully and fairly. In judicial review proceedings, relief will lie for error of law, albeit on a discretionary basis. See *Rodgers v Brixton Prison Governor* [2003] E.W.H.C. 1923 (Admin) at [17]-[18] in which the court found it unnecessary to decide whether the case *Cheblak* prohibited the grant of habeas corpus because unlawful imprisonment would be bound to give rise to a remedy in judicial review that would lead to the prisoner's release.

³ Editor, 'State of emergency in Montenegro: Save energy, remove snow, and forward emergency requests to authorities', emg.rs, 12 February 2012.

⁴ Kant published important works on ethics, religion, law, aesthetics, and history.

⁵ Hobbes' 1651 book *Leviathan* established the foundation for most of Western political philosophy from the perspective of social contract theory.

⁶ Locke was widely known as the *Father of Liberalism*.

⁷ Montesquieu, was a French social commentator and political thinker who lived during the Enlightenment. He is famous for his articulation of the theory of separation of powers, which is taken for granted in modern discussions of government and implemented in many constitutions throughout the world.

⁸ David Cole teaches constitutional law, national security, and criminal justice at Georgetown University Law Center.

Justice Department rounded up thousands of foreign nationals, who were interrogated without legal representation, charged with technical immigration violations, and deported, after the suspension of habeas corpus. This anti-communist crusade occurred during the ‘Palmer Raids’ of 1918-1921. A. Mitchell Palmer, Wilson's Attorney General, believed communism was ‘eating its way into the homes of the American workman.’ In his essay ‘The Case Against the Reds,’ Palmer charged that ‘tongues of revolutionary heat were licking the alters of the churches, leaping into the belfry of the school bell, crawling into the sacred corners of American homes, seeking to replace marriage vows with libertine laws, burning up the foundations of society.’ With a broad base of popular support, in 1919 Palmer intensified the attacks on political dissent that had begun during the war. Such mass incarcerations also occurred during World War II when 110,000 people of Japanese ancestry were rounded up and deported, through widespread constitutional abuse, though it was later discovered that none were engaged in sabotage or espionage.

In chapter 5, Cass Sunstein⁹ proposes a minimalist approach to intrusions on freedom during wartime. He illustrated with instances of the U.S Supreme Court which adopted a minimalist approach by requiring clear authorisation for executive action, insistent on fair hearings for all those deprived of their liberty; and made judicial decisions that were of the least constraint. Controversially Posner viewed the deportation of thousands of Japanese Americans during World War II as minimalist action by the court. President Lincoln’s grave act of the suspension of the habeas corpus was claimed to be an example of a minimalist approach to civil liberties. It is known that habeas corpus, in principle, is *not* a discretionary remedy, but a writ of right rather than a writ of course.¹⁰ If a prisoner does raise an arguable issue, there is no room for discretion- the matter should proceed to hearing so that a full and proper determination can be made. This non-discretionary nature of habeas corpus is an important difference between it and other pre-judicial writs. The rule is that the habeas corpus writ issues *ex debito justitiae*¹¹, ie the court may only properly refuse relief on the grounds that there is no legal basis for the application. The habeas corpus must never be refused on discretionary grounds.

In chapter 6, Lucia Zedner¹² quotes Ashworth whom it is said is ‘critical of those who argue that rights must be upheld even if the consequence is death or that social catastrophe will inevitably arise’. This argument Zedner claims, omits the factor of not knowing what risks will arise. In favour of the continued adherence of due process values.

In chapter 8, Clive Walker¹³ titled his article ‘keeping control of terrorists without losing control of constitutionalism’. He discusses control orders and the background to the enactment of control orders. The English are familiar with neighbouring terrorists and had long since implemented emergency restrictions in the Prevention of Violence (Temporary Provisions) Act 1939. Control Orders, since deemed to be illegal by the European Court of Human Rights, dealt with anticipatory risk led by police intelligence rather than actual convictions or track records, which Walker states as being a better solution than detention without trial, concluding that a criminal justice response to terrorism would be preferable to exceptional or extraordinary measures. ‘A criminal justice response carries the important moral platform of legitimacy and fairness, whilst offering a practical response to danger’, he states.

In all, this is a most important book. It brings to the table some of the greatest thinkers on the subject of civil rights and security.

⁹ Cass R. Sunstein is currently the Felix Frankfurter Professor of Law at Harvard Law School.

¹⁰ *Ex parte Corke* [1954] 2 All ER 440. See also *re Wood* [1927] 48 C.C.C. 146 (N.S.S.C.)

¹¹ A debt of justice; a legal obligation.

¹² Lucia Zedner holds the position of Professor of Criminal Justice in the University of Oxford and is a fellow of Corpus Christi College, Oxford.

¹³ Clive Walker is Professor of Criminal Justice Studies at the University of Leeds.