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Examining critical perspectives on human rights: an introduction

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From political considerations to grand principles

As Costas Douzinas writes, it is possible to regard the Universal Declaration of Human Rights (UDHR) in 1948 as a turning point at which natural rights attained the dignity of law,[1] 'albeit of a somewhat soft kind'.[2] Over sixty years later, in the words of Francesca Klug, '[i]t is easy to forget that until the UDHR was adopted, virtually *any* criticism – let alone interference – by one government with the treatment of the citizens of another, was considered a breach of the principle of national sovereignty'.[3] But much as hindsight suggests that the general acceptance that '[s]tates now have duties to each other and to their subjects to observe human rights' amounted to an event by which traditional understandings of the relationship between the individual and the state had been 'turned upside down',[4] Douzinas's 'soft law' caveat remains essential.

Firstly, even as the idea of human rights was enshrined by Francis Fukuyama as part of the 'end of history' in the heady days for Western liberal democracies that followed the end of the Cold War,[5] there was a tension between the expansive vision of human rights advanced by the concept's proponents and the reality of the concept at work within the legal systems of liberal democracies. Conor Gearty allows that the concept needed to exude confidence to gain traction amongst policy makers:

Our thanks to Elena Katselli (Newcastle University) and Robert Dickinson (Newcastle University) for their advice and comments upon earlier drafts of this introduction. Any errors remain our own.

[1] GA Res. 217 A (III), UN Doc. A/810 (10 December 1948).
[2] C. Douzinas, *The End of Human Rights* (Oxford: Hart, 2000) p.9.
[3] F. Klug, 'The Universal Declaration of Human Rights: 60 years on' [2009] PL 205, 207.
[4] C. Palley, *The United Kingdom and Human Rights* (London: Sweet & Maxwell, 1991) p.37.
[5] F. Fukuyama, The End of History and the Last Man (New York: Free Press, 1992).

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> The phrase 'human rights' is a strong one, epistemologically confident, ethically assured, carrying with it a promise to the hearer to cut through the noise of assertion and counter-assertion, of cultural practices and relativist perspectives, and thereby to deliver truth. To work its moral magic, human rights needs to exude this kind of certainty, this old-fashioned clarity.[6]

But, as David Kennedy came to recognise, in ascending to a role amongst the gamut of concerns feeding into governments' policy making, international human rights standards shed much of their transformative potential. From the outset, these standards were approached pragmatically by governments, which seek to gain the legitimacy of being 'rights respecting' whilst maintaining the maximum scope for their freedom of action. The employment of human rights as a 'status quo project of legitimation'[7] by the Government of the United States of America (USA) can be seen as early as the famous case of *Brown* v. *Board of Education*,[8] in which the US Supreme Court unanimously ruled that the segregation of public schools was unconstitutional. The US Government submitted an *amicus curiae* brief which argued that '[i]t is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed'.[9] In other words, the existence of racial segregation within the southern states could be exploited by America's Cold War rivals in the battle for influence in the developing world. Human rights arguments were explicitly coupled to Cold War foreign policy objectives, creating a heady brew which 'could not fail to impress Cold War patriots sitting on the Court'.[10] Today *Brown* is regarded as one of the stepping stones by which the USA sought to extricate itself from its historical failures to secure the benefits of liberal democracy for citizens regardless of race. But, in light of the failure of the US Government to take action to enforce it for another decade, the decision's primary impact on the Eisenhower Administration was that it provided an opportunity to market the credentials of the US system of government to the world.

[6] C. Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006) p.19.
[7] See Chapter 2, p.33 below.
[8] *Brown* v. *Board of Education of Topeka* 347 US 483 (1954).
[9] P. Kurland & G. Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States* (Arlington, VA: University Publications, 1975) vol. 49, p.121.
[10] L. Powe, *The Warren Court and American Politics* (Cambridge, MA: Belknap Press, 2000) p.35.

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Nor was the US State Department alone in co-opting human rights to the ideological battle of the Cold War. In May 1948, as tensions built towards the Berlin Blockade, Winston Churchill declared that:

> [t]he Movement for European Unity must be a positive force, deriving its strength from our sense of common spiritual values. It is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law.[11]

Despite Churchill's soaring rhetoric it was only in the 1970s that human rights began to gain traction within the policy-making circles of even Western governments. Churchill's 'Charter of Human Rights' for Europe had come into being in the form of the European Convention on Human Rights and Fundamental Freedoms (ECHR),[12] but the novel enforcement mechanism of the European Court of Human Rights had achieved little by the time the United Kingdom (UK) accepted the ability of individuals to petition the Court in January 1966, meaning that 'the Convention was a sleeping beauty (or slumbering beast, depending upon one's viewpoint)'.[13] Wiktor Osiatynski provides convincing reasons why the concept of human rights had largely lain fallow since 1948. Only in the 1970s had Western governments 'finally removed the human rights liabilities [by a process of decolonisation for many European countries and desegregation in the USA] that had made governments somewhat skeptical to the idea of human rights immediately after World War II'.[14] In his contribution to this collection David Kennedy remembers how the concept of human rights seized progressive thought:

> Jimmy Carter had made human rights a respectable vernacular for transposing what we remembered of sixties idealism to international affairs. I know my academic colleagues felt we were redeeming the better promise of Carter's diplomacy, turning the Cold War struggle from proxy wars to direct affirmation of democracy and citizens' rights.[15]

Taken in isolation, Kennedy's focus on 'citizens' rights' might be thought to betray some of his discomfort with the direction in which the human

[11] W. Churchill, *Europe Unite: Speeches 1947 and 1948* (London: Cassell, 1950) 310, p.312.
[12] 213 UNTS 222 (3 September 1953).
[13] A. Lester & K. Beattie, 'Human rights and the British constitution', in J. Jowell & D. Oliver (eds), *The Changing Constitution*, 6th edn (Oxford University Press, 2007) 59, pp.63–4.
[14] W. Osiatynski, 'Are human rights universal in an age of terrorism', in R. Wilson (ed.), *Human Rights in the 'War on Terror'* (Cambridge University Press, 2005) 295, pp.297–8.
[15] See Chapter 2, p.21 below.

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rights movement was travelling, for the concept of human rights should in theory extend beyond an individual's allegiance to any particular state. However, in the context of his steadfast criticism of the failure of the human rights movement to close the 'protection gap' between international refugee law and national asylum law,[16] Kennedy's use of this phrase highlights his scepticism at the international human rights movement's capacity to secure its goals. This criticism notwithstanding, by the close of the twentieth century human rights appeared to be embedded as 'grand principles' underpinning liberal democracy. Gearty extolled their role as a bulwark against the excesses of capitalism at a time when socialism had failed to maintain its ideological challenge.[17] Human rights became, in Samuel Moyn's arresting description, 'the last utopia'.[18]

A lost Utopia: the crisis of human rights

A proliferation of academic commentary asserts that the international human rights system is in a state of crisis in the first decade of the twenty-first century. Even at the height of optimism surrounding the potential of human rights,[19] Costas Douzinas argued that they were 'veering away from their initial revolutionary and dissident purposes'[20] and feared 'that the extravagant boasts about the dawn of a new humanitarian age would be accompanied by untold suffering'.[21] In *Human Rights as Politics and Idolatry*, Michael Ignatieff identified both a spiritual and a cultural crisis facing human rights, as proponents struggle with both the 'intercultural validity of human rights norms' and 'the ultimate metaphysical grounding for these norms'.[22]

While a human rights revolution unfolded in the second half of the twentieth century, we now have grounds for thinking that success in advancing this agenda may be giving way to atrophy. In the first decade of the twenty-first century 'the hallmarks of the current era of human rights' became 'the controversial policies of torture, rendition, and of holding

[16] D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, (Princeton University Press, 2004) pp.208–9.
[17] Gearty, *Can Human Rights Survive?*, p.27.
[18] S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press, 2010).
[19] See M. Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000).
[20] Douzinas, *The End of Human Rights*, p.380.
[21] C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Oxford: Routledge-Cavendish, 2007), p.6.
[22] M. Ignatieff, 'Human Rights as Idolatry', in A. Gutmann (ed.), *Human Rights as Politics and Idolatry* (Princeton University Press, 2003) 53, p.77.

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so-called enemy combatants without recourse to legal representation and without guarantee of just treatment'.[23] Indeed, judges and academics dispute whether terrorism has supplanted human rights as the defining concern of the present era of legal theory.[24] At the very least, the reasons to be sceptical of human rights discourse appear to have multiplied over the course of the last decade.[25] The USA's responses to the terrorist threat posed by al Qaeda, from the Guantánamo Bay detention facility to the Abu Ghraib prison in Iraq, have blighted its track record on human rights.[26] Even respected advocates of human rights, such as Alan Dershowitz, have questioned hitherto sacrosanct protections such as the prohibition of torture by debating how to 'manage' torture in the context of counter-terrorism.[27] Further difficulties lie ahead, given the growing geopolitical importance of China, a state which has exhibited a patchy commitment to human rights despite the 'compliance pull' of these norms.[28]

This collection makes no claims to constitute a comprehensive review of contemporary critiques of the human rights project. Instead, using David Kennedy's work as an anchor, the contributors seek to illuminate how aspects of his criticisms of human rights have played out in recent years, examining his work from theoretical, domestic and international perspectives. In doing so, this collection of essays is intended to shed new light on some of the challenges which have faced the concept of human rights in the last decade, and on the future direction of the international human rights movement.

Professor Kennedy's criticisms of the human rights movement

During recent years, in both the international and domestic spheres human rights lawyers and legal theorists have fixated upon whether the

[23] A. Bullard, 'Introduction', in A. Bullard (ed.), *Human Rights in Crisis* (Aldershot: Ashgate, 2008) 1, p.3.

[24] See M. Arden, 'Human rights in the age of terrorism' (2005) 121 LQR 604 and C. Warbrick, 'The European response to terrorism in an age of human rights' (2004) 15 *European Journal of International Law* 989.

[25] See A. Tomkins, 'Introduction: on being sceptical about human rights' in T. Campbell, K. Ewing & A. Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 1, pp.8–11.

[26] See S. Mokhtari, *After Abu Ghraib: Exploring Human Rights in America and the Middle East* (Cambridge University Press, 2009) pp.63–66.

[27] See A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CN: Yale University Press, 2002) p.131.

[28] T. Farer, *Confronting Global Terrorism and American Neo-Conservatism: The Framework of a Liberal Grand Strategy* (Oxford University Press, 2008) p.15.

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concept of human rights provides a valid platform on which to assess human interactions with state bodies. This abstract debate as to the validity of the concept of human rights has often raged irrespective of 'real world' events which have seen millions of people continue to lose their lives in unlawful wars, persecuted on grounds of race or religion, or tortured by oppressive regimes which nonetheless claim to act on behalf of 'rights-respecting' states.

David Kennedy's study of the international humanitarian movement (a reference 'very generally to people who aspire to make the world more just')[29] openly challenges the assumption that human rights are a driver of benign social change. Rather, he claimed that after the Second World War the human rights movement became a distinctly Western project that ultimately serves to entrench the position of the politically and economically advantaged. Kennedy also urges proponents of human rights to subject the concept to robust analysis and not to treat it as a 'frail child' that might wilt under criticism.[30] Kennedy's opening foray regarding the international human rights movement was written on the cusp of events which have taken on the appearance of a turning point (the attacks of 11 September 2001 and their aftermath), not only for human rights as a concept, but also for the USA, the country most associated internationally with the human rights project.[31] Through this prescient discussion Kennedy (who further refined his thesis in his book, *The Dark Sides of Virtue: Reassessing International Humanitarianism*) cemented his reputation as 'one of the definitive critical voices in international law theory over the last two decades',[32] his scholarship challenging widely held assumptions regarding the nature of human rights and international humanitarianism. His work therefore provides the fulcrum upon which other contributors to this collection can develop their arguments.

In his contribution to this collection, revisiting and updating his analysis of the international human rights movement at the turn of the millennium, Kennedy reminds us that the idea of human rights is not an abstract theoretical construct, but has developed into a system of

[29] Kennedy, *The Dark Sides of Virtue*, p.236. [30] Ibid., p.267.
[31] D. Kennedy, 'The international human rights movement: part of the problem?' [2001] EHRLR 245.
[32] R. Dixon & D. Stephens, 'Book Review: *The Dark Sides of Virtue: Reassessing International Humanitarianism* by David Kennedy', [2004] *Melbourne Journal of International Law* 21 (available at www.austlii.edu.au/au/journals/MelbJIL/2004/21.html#Heading23), accessed 10 January 2011.

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well-established norms supporting the activities of an international movement. When this movement makes claims regarding the universality of human rights Kennedy recognises that it is unsurprising that policy makers often choose to take human rights into consideration when formulating their foreign and domestic policies. A prominent example is the European Union's inclusion of human rights clauses in agreements concluded with third states. Kennedy moreover acknowledges that bodies within the human rights movement, most notably Human Rights Watch, have responded to these developments by evolving from 'watchdog' groups to bodies integrated within international human rights governance.

However, in light of the existence of the serious and widespread human rights abuses noted above, Kennedy identifies the conflicting temptations towards idolatry and pragmatism as threatening to undermine the successes of the human rights movement. He contends that idolatry of human rights standards has led human rights activists to overburden the concept with ever more ambitious social and economic rights, whilst preventing them from considering other solutions to these issues. The expression of vague values as legal norms opens them to selective interpretation and gives an advantage to litigious sections of society aware of how to manipulate the legal system to protect their interests. These criticisms are increasingly gaining traction within the human rights debate in the UK. In a much-quoted Policy Exchange report on the UK's place within the ECHR, Michael Pinto-Duschinsky warned that 'whenever vital political matters are decided in courts of law, the power of pressure groups will almost inevitably burgeon,'[33] skewing rights debates towards the interests of politically organised groups.

Pragmatism, according to Kennedy, also has its perils, as evidenced by the risks inherent in the application of human rights concepts when assessing whether causing the death of individuals during an armed conflict is necessary and proportionate. The law of war accepts that the use of armed force during a conflict is legitimate under specific circumstances, and that the loss of the life of an individual may be justifiable as collateral damage. Nonetheless, the inculcation of human rights values into military operations has enhanced the legitimacy of the actions of armed forces resulting, according to Kennedy, in a state

[33] M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights compatible with Parliamentary Democracy in the UK* (Policy Exchange, February 2010), p.17.

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of 'lawfare' which enables 'rights-respecting' states to rely more readily upon military responses to threats.

With these arguments providing the focal point, this collection analyses how, in the light of such chastening experiences, human rights can become a more responsive and more reliable mechanism for holding states to account, or whether, as Kennedy suggests, we need to look for new solutions to these problems. The collection will be divided into three sections, examining domestic, international and theoretical responses to the challenges laid down by Kennedy.

Domestic human rights perspectives

The first section of the collection will focus upon how domestic systems of rights protection, particularly in the UK and the USA, have withstood the crisis of human rights in the last decade. Since the enactment of the Human Rights Act (HRA) 1998, human rights hubris has gripped the legal systems of the UK. Comfortable assertions of the value of human rights in the face of evidence of serious abuses by the UK Government, in the form of compelling allegations of its complicity in torture overseas and use of information derived from such torture, provide the setting for Keith Ewing's paper. Ewing attacks the UK judiciary's supine response to such government activity, exposing the degree to which many judges have hidden behind impressive pronouncements of their abhorrence of torture, whilst delivering decisions which place minimal restrictions upon government. Moreover, he questions the usefulness of the HRA, concluding that, in the hands of domestic judges, the Act has played little role in strengthening protections for individuals against torture. Together, these arguments build into a powerful critique of a form of human rights 'idolatry'[34] which sees the courts do little more than 'pay lip-service'[35] to the importance of the principle that the UK's legal systems should be free from the taint of torture.

David Bonner's contribution picks up the baton from Ewing in analysing the performance of the judiciary on the related subject of non-*refoulement*. He sets out to analyse the efforts of the UK Government to circumvent Article 3 ECHR and case law before the European Court of Human Rights which restricts the deportation of foreign nationals to

[34] See Chapter 2 below.
[35] *A* v. *Secretary of State for the Home Department (No 2)* [2005] UKHL 71, para.80 (Lord Nicholls).

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states where they are likely to face torture, or cruel or inhumane treatment. In the course of the legal battles over detention without trial, and subsequently control orders, the UK government developed an argument that these measures, and the infringements of human rights that they involved, could be justified on the basis that the government was subject to a positive obligation under Article 2 ECHR to protect the right to life. Ultimately, judges such as Lord Hope gave some credence to this argument, accepting that 'the first responsibility of government in a democratic society is owed to the public'.[36] Bonner's contribution illustrates the capacity of national governments to co-opt international human rights standards and language to serve their purposes, a powerful example of the 'risks, costs and unanticipated consequences of human rights activism' which Kennedy highlights.[37]

A more subtle crisis has also befallen the concept of human rights in the form of a division between those who see human rights as restricted to traditional civil and political rights and the advocates of wider socio-economic rights. Socio-economic rights advance human rights deep into the sphere of allocation of scarce resources, and to detractors mark the point at which human rights mount a challenge to democratic governance. Nonetheless, they also maintain the transformative value to human rights. As John Gray has noted, factors like exclusion of groups from participation in society, failure to maintain a stable economy or to provide adequate public services and security from crime, seem to lie at the root of a regime's legitimacy with individuals under its authority: '[r]egimes which meet these needs will be legitimate whether or not they are democratic, while regimes that do not will be weak and unstable however democratic they may be'.[38]

Examining Kennedy's assertions that the concept of human rights has been co-opted to the purposes of the state, particularly the idea that '[t]o be free ... is to have an appropriately organised state',[39] Liora Lazarus argues that political discourse around the conflict between security and rights since 9/11 has been complicated by the argument that the 'right to security' can be viewed as the meta-right (the right of rights). This argument, and the inherent ambiguity of the right to security, has the potential to lead to a 'securitisation' of human rights which threatens to erode the traditional foundations of human rights, and human rights themselves.

[36] *Secretary of State for the Home Department* v. *AF* [2009] UKHL 28, para.76.
[37] Kennedy, *The Dark Sides of Virtue*, p.1.
[38] J. Gray, *False Dawn, The Delusions of Global Capitalism* (London: Granta, 1998), p.18.
[39] Kennedy, *The Dark Sides of Virtue*, p.16.

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Human rights norms are often couched in transformative language, with Claire Palley asserting that:

> [t]he dramatic language of 'human rights and fundamental freedoms', combined with talk of inalienability, immutability, imprescriptibility, universalism and absolutism, is emotive. The effect is the greater because human rights represent values in which people believe, for example, the worth of life, liberty, free speech, free trial, justice according to needs and absence of discrimination.[40]

Even within liberal democracies, however, the operationalised reality of human rights appears to be rather more prosaic. Such countries have endeavoured to constitutionalise their systems of government to a degree compatible with maintaining an important sphere of political debate. Some countries, like the USA and UK, have arrived at different accommodations of these concerns, producing atypical models of domestic rights protection. Colin Murray's chapter examines the consequence of these constitutional compromises which have emerged in both countries' responses to terrorism since the attacks of September 11. The constitutional rights protections in place within the USA serve not to prevent rights abuses but to channel responses to emergency situations against other, less well-protected, interests. Murray challenges the supposition that 'European human rights law would allow more infringements of liberty, in the name of national security and public order, than does the US Constitution',[41] contending that the ostensibly weaker rights protections in the UK carry the potential genuinely to constrain rather than simply redirecting the focus of counter-terrorism responses.

International human rights law perspectives

Kennedy's scepticism of the 'pragmatic' invocation of human rights norms in the context of the ongoing fight against terrorism provides the narrative basis for the second section of the collection, which relates to international human rights. The indefinite detention of individuals without charge or trial in Guantánamo Bay, the abuses amounting to torture in Abu Ghraib Prison in Iraq and the imposition of sanctions against individuals by the Security Council remain fresh in the memory

[40] C. Palley, *The United Kingdom and Human Rights* (London: Sweet & Maxwell, 1991), pp.75–6.
[41] S. Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Oxford: Hart, 2008) p.21.

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