Blaming Legal Positivism: A Reply to David Dyzenhaus

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Political philosophy is replete with attempts to resolve the perennial problem of how to guard the guardians. Within this literature there is a recurrent theme that chastises legal positivism and legal positivists for failing to come up with the goods when governments kick over the traces by flouting universal standards of decent behaviour. Brave judges, armed with sound conceptions of natural law are, it is argued, in a better position to withstand evil governments and have a better track record in so doing. Nazi Germany and apartheid South Africa are the favourite illustrations of this alleged phenomenon.[1]

These themes have re-emerged with respect to the flurry of anti-terrorist laws being enacted in jurisdictions around the world in the aftermath of the carnage perpetrated on September 11, 2001. Governments, it is widely believed, must have special powers to forestall such terrorist outrages, powers to deal with those they suspect of perpetrating or conspiring to perpetrate such outrages. that suspend or override the normal civil rights of such individuals with respect to their personal liberties.[2]

Proposals to suspend the civil liberties of persons named as suspect terrorists are widely criticised by those who fear that such powers can be used by governments to suppress their opponents and perpetrate grave injustice on innocent persons. A recent advertisement in the *Australian* newspaper likened the Bill currently before the Australian Parliament to the emergency decree that overturned the Weimar republic in the moral panic following on the Nazi-rigged Reichstag fire. The debate rages as to whether the goal of preventing terrorism warrants such risks, and, if it does not, how we should mount an argument against such measures. It is here that we come up against aspects of the ongoing clashes between natural lawyers and

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1 See H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593-629; David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991).

2 For instance, in Australia, the *Security Legislation Amendment (Terrorism) Act 2002*.

legal positivists that bear on the issue of how judiciaries should respond to potentially oppressive anti-terrorist laws.

Assuming these laws pass the appropriate validity tests according to the reigning rule of recognition, and that the approved sources of law are adequately democratic, should they be applied as any other statute albeit read narrowly and strictly so as to make minimum inroads on traditional civil liberties, or should they be rejected or rewritten by the courts in the light of fundamental common law values or such constitutional provisions as may be available within their jurisdiction?

In David Dyzenhaus's scenario, the task is to find a way of controlling governments in polities where legislatures license officials to use wide discretion with respect to the liberties and rights of those officials, within the exercise of their discretion, deem to be related to terrorist activities, past or future. How can this be done without in effect replacing one lot of guardians with another, and making the judges into those officials whose discretion is determinative with respect to the fates of those same people – for that is all we are doing when we replace the decision of one official by that of another. And, to make matters worse, the alternative official (the judicial officer) is not subject to the electoral accountability of the government by whom they are employed to make decisions on their behalf. Hence we have an exercise of power that is neither rule-governed nor democratically controllable.

Dyzenhaus laments that bold neo-common law judges who have crossed, or been helped across, the Rubicon into substantive judicial review of official action and become guardians of legislative validity on the basis of their reading of what fundamental values require, should draw back from continuing their good work in relation to the operational anti-terrorist legislation that gives power to executive officials and or ministers of the crown to identify a person as a threat to national security and on that basis use against that person disadvantageous coercive measures such as deportation, refusals of visas, detention without trial, liability to surveillance and other restrictions on ordinary freedoms. Thus Lord Hoffmann having bravely seen to the extradition of Senator Pinochet[3] (until he embarrassingly stood down from the case for reasons of natural justice) has capitulated to the United Kingdom anti-terrorist laws by declaring that what endangers national security is a matter for the elected government of the day, although allowing that judges may properly determine what constitutes national security.[4]

David Dyzenhaus sees this as an inconsistency. If you make the judges guardians of fundamental values why stop when the application of

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3 HL Appeal Committee 17 December 1998.

4 *Secretary of State v Rehman* [2002] 1 All ER 123.

these values relates to national security? I tend to agree with him. Once you have conjured up a 'principle of legality' that enables you to re-read and so rewrite legislation in the light of your understanding of fundamental principle,[5] it seems inconsistent, and in contravention of these fundamental values, to stop just when they become most germane. Why not have the courage of your convictions and see the principle of legality through to its logical conclusions. After all, if an appeal to 'legality' suffices to provide access by investigative journalists to convicted prisoners, despite clear law to the contrary,[6] how much more does it apply to people who are detained without trial or face a reversed burden of proof to establish their innocence in the face of their assumed guilt? Integrity seems to require an all-or-nothing approach here. Why not go all the way and declare such laws to be incompatible with the European Convention of Human Rights, or the Canadian Charter of Rights and Freedoms?

Yet, on the same basis, it is possible to use the same inconsistency rationale to draw the contrary conclusion and argue that it is a mistake, in the first place, for judges to have started down on a path that they could never consistently sustain in practice. Once you have accepted the principle that judges are the ultimate decision-makers with respect to the specification and enforcement of fundamental values, then the logical terminus is to assume the legislative powers of government and the supervision of the executive in a manner that destroys the traditional separation of powers and leaves only minor matters for democratic decision-making.

A comparable situation is evident in the way that the Mason Court in Australia, having started down a path of rewriting the law on the basis of abstract concepts, such as representative government and the sovereignty of the Australian people, nevertheless baulked at the perfectly logical extrapolation of this approach argued for Justices Toohey and Deane[7] that equality before the law requires that courts assess the propriety of all distinctions that are embodied in legislative acts. Such a principle, of legality or equality, empowers a court to pass judgment on the substance of any legislation that comes before it by challenging the relevance of any distinction drawn in the legislation and its proportionality to the ends it purports to serve. In the event, the anti-democratic enormity of this conception of the rule of law was too much for the court and its successors are left with a compromising and unprincipled retreat into opportunistic judicial activism with respect to implied constitutional rights.

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5 *R v Secretary of State for Home Department, ex p Simms* [2000] 2 AC 115 at 131.

6 *R v Secretary of State for Home Department, ex p Pierson* [1998] AC 539 at 573G-575D and 587C-590A.

7 *Leeth v Cwth* (1992) 174 CLR 455.

Does integrity require that judicial review of legislation based on fundamental values is an all-or-nothing matter? Must such substantive judicial review be forever open to the criticism that it is bound to be either over or under inclusive in its application?

One way of seeking to provide a limited form of judicial review is to confine it to securing the rule of law, and that is the framework within which Dyzenhaus approaches the issues of anti-terrorist legislation. He uses the fact that many people are seriously worried by such legislation to mount an argument for a substantive version of the rule of law that includes not only the formalities of natural justice, but also the fundamental values that he divines in the common law, presumably after excising those remnants of that long history that he deems to be of lesser or no value. The contrasting idea of the rule of law is that government should be conducted in and through the medium of clear, intelligible, practicable and reasonably precise rules, rules that are themselves identifiable through the application of criteria that list empirically observable sources of positive law.[8] This narrow or thin version of the rule of law is associated with the classical legal positivism that is deemed to be insufficient, indeed pernicious, in that it allows governments to do what they like, as long as they get the legal form right. A legalistic form of the rule of law is one reason why legal positivism is to blame for the failures of courts to withstand the enactment of evil laws.

Dyzenhaus focuses on one version of legal positivism (democratic positivism) not because it is the most culpable form of legal positivism but because it is the most plausible version.[9] This is a normative or moral form of legal positivism that takes positivism beyond conceptual and empirical analysis into the realm of evaluation and prescription in that at least part of what the theory is about is recommending a particular type of legal system, one that takes rules (of the sort described above) seriously and seeks to minimise the role of moral judgment in the actual understanding and implementation of these rules whose content falls to be determined by democratic process. Democratic positivism derives from the Benthamite tradition according to which there are good moral reasons for the rule of positive law, and good political justifications for the view that all positive law should satisfy certain democratic credentials with respect to its origins. Democratic positivism is grounded in the benefits provided by positively good law together with the legitimation that follows from its democratic pedigree. Such a theory does not get hung up on abstract conceptual issues concerning the meaning or concept of law, but asserts a normative theory, the theory of prescriptive hard positivism, to the effect that the criteria for identifying valid law ought not to require the exercise of speculative

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8 See Joseph Raz, 'The Rule of Law and its Virtue' in Raz, *The Authority of Law: Essays in Law and Morality* (1979).

9 P. 00

judgments, whether of fact, morality or metaphysics for their understanding and implementation.

Yet, supposing that we are agreed that open-ended anti-terrorist laws are unacceptable, and that this is because they violate the rule of law, it may be that they are unacceptable because they break the 'thin' standards of the rule of positive law, so that we do not need to bring in the more controversial 'thick' or natural law versions of the ideal to condemn such proposals. After all, are the current crop of anti-terrorist laws not positivistically bad law? The terminology of 'national interest' and 'threat' are paradigm examples of abstract concepts that are so indeterminate as to be useless in distinguishing between what is and what is not illegal. It is simply not possible in an objective way to determine whether or not a person or group is or is not a threat to national security because national security is a concept whose boundaries are so fuzzy as to be unidentifiable.

This approach comes out of the positivist aspects of democratic positivism more than its democratic ingredients. According to the theory, even democracies are not permitted to rule via such poorly formulated laws. Part of the reason for this is that such a system would in fact be less than democratic since the choice between having and not having such laws is insufficiently clear to constitute a choice, whether democratic or not, and certainly not a choice that would enable the individual voter to have any awareness in advance of its implications for herself or other specific persons or groups. But quite apart from that, such poorly formulated laws are a standing danger to the liberty of individuals who cannot know what it is that they permit or forbid, on the balance of probabilities, let alone beyond reasonable doubt. The terms are insufficiently precise and the factual judgments required too speculative to count as minimally good law.

Dyzenhaus might argue that this manoeuvre does not get to the heart of the issue. He could point out that the anti-terrorist laws are still objectionable even if they can be rewritten in terms that better fit the positivist model. Let us say that a court refuses to apply a vague anti-terrorist law on the grounds that it does not enable us to draw a clear enough line between what is criminal and what is not. Suppose a legislature then comes up with something much more precise and concrete: if in the opinion of the minister there is a five per cent or greater chance that a person could be responsible to the violent deaths of five or more people within the next three years, then they may be deported, or detained without trial. (Perhaps 'with political motives' is required in addition if we are to distinguish terrorism from the acts of ordinary criminals or deranged persons, but that is unhelpfully imprecise for our purposes.)

This seems clear enough and individual cases could be subjected to objective judicial review where appropriate. Although the specificity may turn out to be spurious in that the required evidence is simply not available,

such a formulation does appear to get over the difficulty that the vaguer laws could be used to disadvantage just about any individual or group that the government did not like. It certainly goes some way towards meeting the difficulty that vague anti-terrorist laws renders our liberty uncertain and beyond our control.

Yet there may still be something grievously wrong with such legislation, something that is in fact brought into the open by the more precise formulation that we have given to it, namely that a person should lose their residence or liberty rights because of something that they might do in the future, or on the basis that there is slender evidence relating to what they may have done in the past.

Two issues arise here. (1) are such laws morally unacceptable? (2) is that unacceptability derived from an infringement of the rule of law?

The first question is important and, importantly, debateable. Dyzenhaus points out that laws that seek to overcome terrorism by internment are generally ineffective. We simply cannot spot the terrorists in advance. But what would he say if they were effective? Let's say that by detaining 100 terrorist suspects we could prevent five horrendous terrorist events. Even assuming that most of the 100 are not would-be terrorists at all but people who were quite mistakenly thought to be such a danger to others, would we say for sure that such a law is not justified? That might depend on the nature of the disadvantage inflicted on the innocent persons and how horrendous the events that might be prevented would be.

It is certainly not possible to argue that we never accept sacrificing individuals to the general welfare in this manner. We routinely do it in the case of mentally ill people who have harmed others. We accept that even 'beyond reasonable doubt' does not mean that no innocent person is ever convicted. We (sometimes) accept military conscription for lethal wars. It is not just that justice has its rough edges, for most people are prepared to accept in some circumstances the propriety of sacrificing the few for the sake of the many, especially in times of war.

Further the case for so doing can itself be justified in terms of fundamental values, in this case the value of individual human life and the institutions that protect it. A selective examination of the fundamental values embodied in the common law tradition, supplemented by our legislative tradition, clearly identifies that human life is valued to the point where extreme measures are justified for its protection, even the loss of innocent persons liberties.

Whatever you think on such an issue, you would be hard put to deny that it is at least arguable then that in societies actually experiencing terrorist activity there is a case for preemptive action even at the high risk of

substantial injustice to individuals and groups precisely because it is aimed at the future and not the past.

This takes us to the second question, is the case against broadly conceived anti-terrorist laws based on rule of law objections? This matters because it bears on whether judiciaries have a prima facie right to intervene in accordance with their own view of what is the right answer to the moral dilemma in question. If they are a violation of the rule of law, then, it may be argued, it is a matter for judges not legislatures.

We may not go along entirely with this thesis. Everything depends here on the vexed question at issue: what is the rule of law? If we take it as the rule of positivistically good law then there is a strong case for saying that judges have a special duty to let into the legal system only that which is in accordance with the rule of law. But if we enlarge the rule of law to contain all the values allegedly fundamental to the common law, which is pretty comprehensive in its scope , then it is much too broad a domain to remove from the control of democratic governments.

In cases where the values in question are controversial, or they are abstract values whose applicable meaning is unclear and awaits more specific determinations, then this makes the matter of enforcing these values prima facie a matter for democratic decision-making. In which case it seems appropriate that the issue of preemptive action against terrorism should be subject to the process of democratic debate and determination, not judicial oversight of the democratic process.

In fact positivism seems to do rather well here. It identifies certain rule of law problems with anti-terrorist legislation that authorises judicial intervention, and would meet most of the grave objections that are made against such laws, encouraging the formulation of policies that are sufficiently clear and specific to be the subject of meaningful debate and choice. On the other hand it prevents judiciaries taking authority to overthrow the sort of controversial decisions that are the meat and drink of a vibrant political culture. Legal positivism is not to be blamed for not encouraging judicial intervention on substantive matters of this sort for such intervention is not justified. Indeed, such non-intervention is a necessary protection of democracy.

Nor is positivism to be blamed for encouraging lack of respect for human life and liberty in this regard. Its contribution to these goals through an insistence on positivistically good law is incalculable, and is put at risk by seeking to replace it by a superficially attractive mandate to give courts a veto over all executive action.

Indeed we may turn the table and seek to blame those who use natural law as a means for encouraging undemocratic conduct by courts for encouraging the sort of woolly law that endangers our liberties. Natural

lawyers, especially those committed to American-style judicial review based on abstract moral principles, or who find broadly formulated fundamental values in the common law that they seek to use to override legislation, have encouraged the idea that good law can consist in affirmations about justice, fairness, unconscionability and enduring values, drawn in such broad terms that everything depends on the operative meaning ascribed to such generalities by those who apply the law. This is an open invitation to legislatures to follow suit and restrict our freedoms on the basis of such generalities of national security and terrorism.

While it seems extravagant to blame natural lawyers per se for encouraging departures from the hard won ideals of the rule of positive law, it is certainly no more extravagant than to blame legal positivists for undue judicial subservience to elected governments. After all, the failure in *Liversidge*,[10] to which the Humpty Dumpty label attaches, was a failure to follow the plain meaning of the statute, just as at least some of the failures of the Weimar judiciary were not applying the ordinary law of the land to Nazi political thuggery in the streets.[11]

Justices Hoffmann, Woolf, Laws and Sedley in the UK, the remnants of the Mason High Court in Australia and Charter enthusiasts in Canada have looked into the abyss of juristocracy and drawn back. Once we are all more aware of where they have got to and why the exercise of judicial power in the service of abstract moral values is unacceptable in a democracy characterised by the rule of law, positivistically conceived, and that there is no principled way to draw a distinction between acceptable and unacceptable substantive moral review of democratic legislation, then we may wish to further restrict such powers of judicial review and turn our attention more to the formal quality of our legislation. This would more clearly place the political responsibility for the enactment of morally justifiable legislation on Parliaments and the citizens who elect them. In the meantime lawyers are following an appropriate professional ethic in resisting the implementation of interventionist legislation that is drafted in unacceptably vague terms.

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10 *Liversidge v Anderson* [1972] AC 207.

11 Ingo Muller, *Hitler's Justice: The Courts of the Third Reich* (1991).