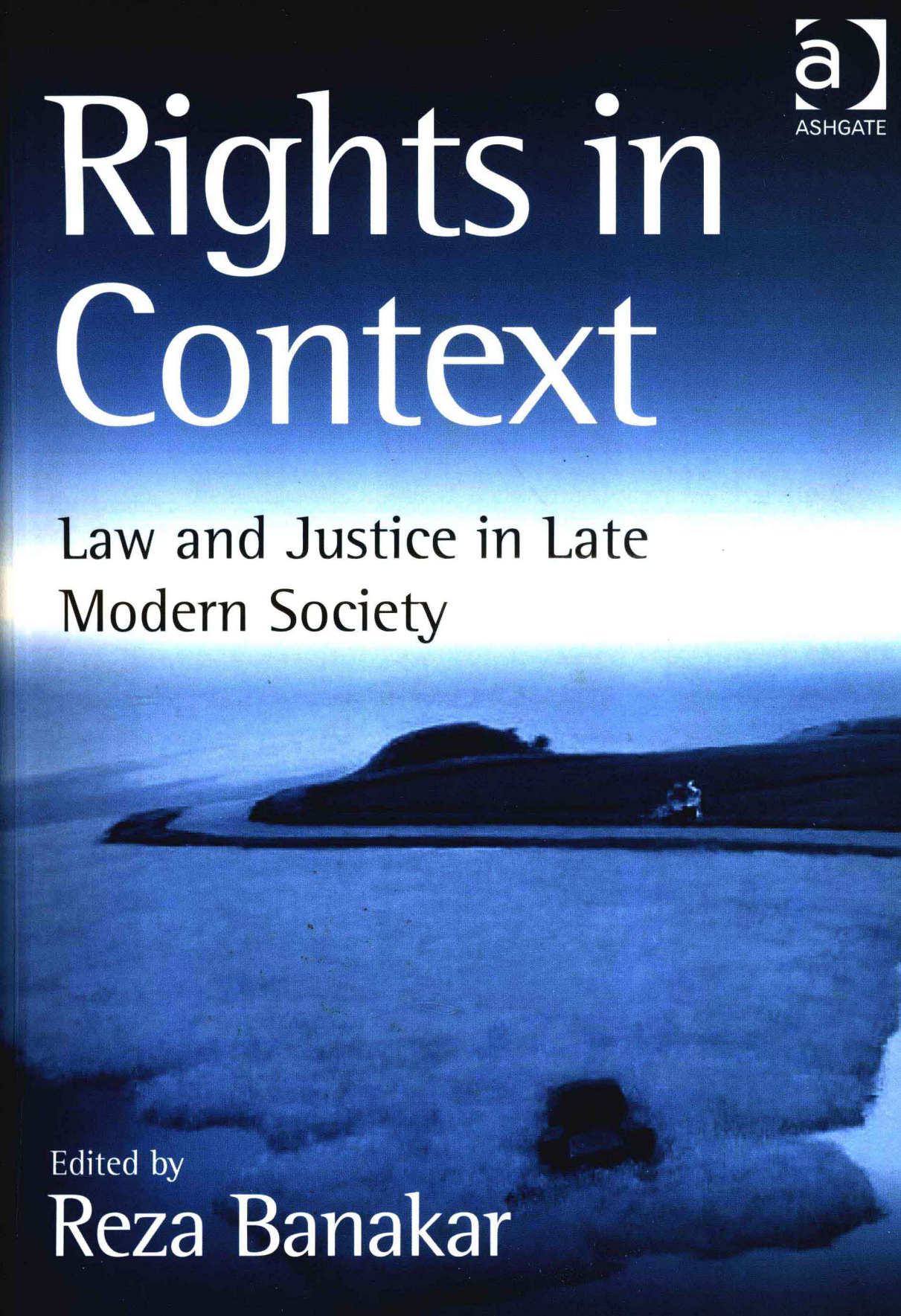
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Rights in Context
Law and Justice in Late Modern Society
Edited by
Reza Banakar

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Introduction: Snapshots of the Rights Discourse

Reza Banakar

We often hear that rights talk pervades politics, law and morality, that rights have never played a more decisive role in the formation of local and global relations, that rights are used more frequently than ever before to debate and resolve social, legal and political disputes, that rights emerge out of attempts to deal with or prevent injustice, and that rights can support strategies of emancipation. At the same time, we are warned that many of the rights we have been taking for granted are being undermined and their existence threatened by forces intent on recasting the domestic and international political order. These attempts to reorganize the political order by reconstructing rights are not, we are told, done in search of justice, but to enhance social control and political domination.[1] The volume at hand consists partly of attempts to examine such assumptions by exploring the role of rights in public political discourse, policy debates and legal decision making.

The collection of chapters presented here is the product of a workshop on rights discourse organized at the International Institute for the Sociology of Law in Oñati in May 2008. The first objective of the workshop was to bring together researchers from various fields to discuss how civil rights and civil liberties had been publicly debated in more recent years and to examine the impact of the rights discourse on the formation of law and politics. The workshop also asked if the events of 9/11 had been, as suggested by some analysts,[2] a watershed moment in the modern history of rights and used to justify a fundamental change of direction in the interpretation and application of certain rights used to debate politically sensitive issues such as multiculturalism, freedom of expression, war, torture and terrorism. How are legal and moral rights used to shape political debates and legal decisions and to justify controversial domestic and international policies? How do various approaches of law, social sciences and philosophy view and conceptualize the recent discourses on rights? These were some of the questions raised prior to the workshop.

The chapters presented in this volume provide snapshots of how rights are used and debated in Western democracies in the beginning of the twenty-first century. In addition, they bring to the fore a number of other issues which were not initially on the agenda of the workshop. For example, in the following pages the separation of positive law, rights, morality and justice is challenged, and it is suggested that whenever we explore the limits and applications of rights in specific social settings, we also become concerned with the possibility of delivering justice. In other words, an engagement with rights can also become an engagement with justice. Another issue concerns the role of law and the state in the global society. In the pages of this volume we

1 See, for example, A Dershowitz, *Rights From Wrongs: A Secular Theory of the Origins of Rights* (New York: Perseus, 2004); S Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004); U Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2002); B Goold and L Lazarus (eds), *Security and Human Rights* (Oxford: Hart, 2007); C Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (London: Routledge-Cavendish, 2007).

2 See, for example, J Strawson (ed.), *Law after Ground Zero* (London: GlassHouse, 2004) and P Sand, *Lawless World: America and Making and Breaking of Global Rules* (London: Allen Lane, 2005).

find a concern with the inability of late modern states to provide adequate protection for individuals and groups who find themselves within their national borders. At the same time, as the role of the state appears to be undergoing a transformation, a new homogenizing and totalizing global order is emerging.[3] Transnational law, with human rights as its vanguard and the harmonization or unification of private international law as its core project, spearheads this new emerging order.[4] Human rights demand, if necessary through 'armed cross-border intervention',[5] that states comply with a standard set of values, which in the first place defines the rights of the individual. To borrow from Costas Douzinas, human rights have become the 'official ideology of the new world order after 1989', and it is 'in the name of human rights, democracy and freedom' that all recent wars and occupations have been wholly or partly carried out.[6] Correspondingly, Eric Hobsbawm refers to the international policies of great powers which 'selectively' (that is, in the Balkans but not in central Africa, in Iraq but not in Saudi Arabia or Pakistan) champion human rights, even though human rights are incidental to their objectives, as 'the imperialism of human rights'.[7] Private international law similarly demands and works towards the harmonization and unification of commercial relations across jurisdictions.[8] This form of transnational law, created and developed outside the institutions of the modern state, is becoming increasingly independent of the nation states,[9] and thus different from traditional international law, which regulates the relationship between states. At the same time, this emerging legal order poses a challenge to the legal pluralism associated with the globalization of law according to which law-making processes take place in multiple centres.[10] The drive towards establishing human rights and democracy and the urge to harmonize and unify commercial laws and practices across jurisdictions do not remove the multiple centres of normativity and their expressions in terms of plural legal orderings. They only indicate the internal contradictions of the new world order, which on the one hand continues to consist of decentralized law-making processes, while on the other is driven forward by incessant homogenizing forces that seek to reorganize the world under one single ideology.

Law is, thus, an integral component of the new world order, parts of which are not only currently under construction in places such as Iraq and Afghanistan, but also in chambers of commerce, mega law firms, the UN, the WTO, etc. The relationship between law and politics is, therefore, being reconsidered and reconstructed in such a way that it challenges law's traditional role in relation to society and the nation state. This, in turn, requires a recasting of the rights that have traditionally underpinned the concepts of Western law and democracy. The emerging global order is not, however, the primary focus of the collection of chapters presented in this volume; rather, it

3 Hardt and Negri use the concept of 'empire' to describe this emerging global force. See M Hardt and A Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000).

4 M Goodale, 'Empire of law: Discipline and resistance within the transnational system', *Social and Legal Studies*, 14 (2005), 553–83, at 556.

5 E Hobsbawm, *Globalisation, Democracy and Terrorism* (London: Abacus, 2007), at 7.

6 Douzinas, above, n. 1, at 12.

7 Hobsbawm, above, n. 5, at 7.

8 This was already an established subject of debate in law and socio-legal research in the 1990s. See, for example, V Gessner and AC Budak (eds), *Emerging Legal Certainties: Empirical Studies on the Globalisation of the Law* (Aldershot: Ashgate, 1998); B de S Santos, 'Globalisation, nation-states and the legal field', in *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995); Y Dezalay and BG Garth, *Dealing in Virtue* (Chicago: University of Chicago, 1996); G Teubner, *Global Law Without a State* (Aldershot: Dartmouth, 1997).

9 Goodale, above, n. 4.

10 R Cotterrell, 'Spectres of transnationalism: Changing terrains of sociology of law', *Journal of Law and Society*, 4/36 (2009); G Teubner, *Global Law Without a State* (Aldershot: Dartmouth, 1997).

is the inevitable backdrop against which domestically organized efforts to employ and reconstruct rights unfold. Expressed differently, in the following we are interested in how rights are employed as part of the process that globalizes Western societies from within.

Contested Rights

Each chapter in this volume deals either with rights employed to challenge the state of affairs and demand changes in the way society is de facto organized, or with the legal and political strategies employed to curb the existing rights and duties utilized to shape and reshape existing relationships. It is, for example, about artists who employ their freedom of expression to astonish and shock their audience, and about those who mobilize the public's sense of morality and decency to curb the artists' rights of expression. It is about young British-born Muslim women, who use their freedom of religion and thought to return to the hijab, arguably, to reclaim their identity and autonomy, and about those who challenge them by banning the wearing of 'ostentatious' religious symbols in public places. The first group employs the existing rights and duties to support a claim, while the second group challenges the existing rights and duties in order to introduce new rights and corresponding duties. The former is used when the established order fails to deliver justice, that is, when individuals or groups rightly or wrongly feel that they have been unjustly treated and demand their rights. The latter is employed when practices and strategies of defiance emerge in opposition to established rights in an attempt to introduce a new order out of which a different sense of justice could flow.

It is equally important to consider what this collection is not about. The primary focus of the chapters that make up this volume is not on the role or implications of rights in our moral thinking and political history. In this sense, the discussions that follow are not in the first place concerned with the 'objective' aspects of rights that express a universal abstract proposition about the state of affairs, for example, all citizens have the right to freedom of expression. Instead, they are concerned with the 'subjective' sides of rights, which bring into focus the *relationship* between the individual or a social group and a particular state of affairs, for example, how the individual's rights to freedom of expression are exercised within a given legal and socio-political context.[11] Expressed differently, the emphasis of the collection is not on the moral content of rights as such, but on how rights are employed by various actors and interest groups as a strategic tool to create and recreate social relations and structures over time. In addition, the collection is substantively limited, addressing only a handful of issues related to multiculturalism, immigration, religion, terrorism, art and finance in Western democracies, leaving out a very large number of important areas such as environment, sexuality, development and issues such as the right to life. Notwithstanding this substantive limitation, we hope that the collection provides a series of interrelated and complementary snapshots of rights discourse in the beginning of the twenty-first century.

It should also be noted that 'late modernity' is employed here narrowly to explore how the spread of global market economy transforms the traditional social structures and institutions of modernity. This transformation brings about higher levels of socio-cultural diversity and uncertainty, but does not necessarily dissolve the apparently 'solid' structures of all social institutions.

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11 For a discussion on the objective and subjective aspects of rights, see WA Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004).

The Layout and Chapters

The collection of chapters presented in this volume may be grouped in several ways. Besides being concerned with how the notion of rights is applied and developed in public political discourses, many chapters either overlap in respect to their substantive focus or are linked through their theoretical concerns. These chapters could have been grouped according to, for example, their concern with culture, religion, gender, freedom of expression, security and terrorism. Irrespective of which type of classification we might choose to structure the collection, different chapters will inevitably overlap in more than one respect, indicating their embeddedness in a broader ongoing discourse on the relationship between law, morality and justice. The current grouping that the editor has opted for is a sociological one reflecting how rights *operate* in public political and legal discourses, that is, how they are *applied* by various individuals and groups as part of an ongoing dynamic socio-legal process to realize different aims. The keywords used to group the chapters into four sections are: critique, challenge, strategy and reconstruction.

The collection starts with five chapters that critically examine rights not only as part of the legal and political discourse, but also in the context of social theory. The second section, also containing five chapters, distinguishes itself from the first section by examining how rights are used to challenge and alter the state of affairs. The third section also deals with how rights are used in social and legal settings, but the three chapters placed in this section share the practising lawyer's concern with using rights as a legal strategy. The collection ends with four chapters that explore the reconstruction of rights.

The first chapter, written by the editor, aims to provide a preliminary theoretical framework for situating the various debates and issues in this volume. This chapter may be read at the outset as an extended introduction, which situates the debates in a broader theoretical perspective. It can equally be read at the end as the editor's reflection on how the disparate concerns of various chapters may be brought together under the theoretical umbrella of late modernity, which necessitates a re-examination of the concepts of law, society and the state. This chapter starts by introducing the notion of late modernity as the second stage in the development of modernity when many relationships – and their corresponding rights and duties, which are traditionally defined and regulated by the nation state – are undermined by the intensification and expansion of economic, political and cultural interrelationships across the globe. It will then explore how the intensification of interrelationships, a growing interdependence of people living in different parts of the world, and the changing character of the nation state influence and shape the ways in which rights are debated and employed. The central argument of this chapter is that, under late modernity and owing to the increased functional differentiation of social systems, moral concerns are increasingly marginalized and replaced by complex regulatory regimes, codes of ethics and a rights discourse that is drained from moral considerations and commitments. This chapter also hopes to show that the study of rights discourse can provide a standpoint from which to view how the relationship between law, justice, the state and morality is reconsidered and reconstructed under late modernity.

The Critiques

In Chapter 2, Max Travers presents his sociological critique of the concept of rights. Travers takes a debate between two prominent sociologists, Bryan Turner and Malcolm Waters, as his point of departure. Although Turner and Waters probably share the same general liberal views of political events and, more importantly for our purposes here, also agree that rights are necessary elements

in the formation of modern societies, they nonetheless disagree on what sociology can say about rights. For Turner, the sociological scepticism of rights is no longer valid in the global world-system we find ourselves in today. The study of socio-political life in the global context (or within the 'world-system'), where people and states are becoming increasingly interdependent, requires concepts capable of transcending the socio-cultural and legal boundaries of national sovereign states; and 'universal rights' provide exactly one such concept. The fact that we are living in 'one-world' – as fragmented, diversified and antagonistic as this world might be – provides the sociological condition for 'removing the scepticism about a common ontology as a basis for human rights in the absence of a common law tradition'.[12] In contrast, Waters understands the nature of rights as socially constructed, arguing that an ontological theory of rights cannot possess any explanatory value for sociologists.

This is as much a debate concerning the ontology of rights as a debate on the limits of sociological enquiry. Is sociology capable of producing empirically-based value judgments, for example determining if and when freedom of speech trumps hate speech, or should it restrict its analysis to providing empirically-grounded descriptions of the social world, that is, how freedom of speech is de facto used in various cases to trump hate speech? Can empirically-informed sociological analyses determine if or when detention without trial is justifiable, or does it have to limit itself to describing the changing nature, causes and extent of detention without trial? Similar concerns with the relationship between the analytical, descriptive and evaluative aspects of socio-legal research have been raised since the 1960s. Some sociologists, such as Donald Black, have maintained that 'value judgments cannot be discovered in the empirical world' and are therefore irrelevant to the sociology of law.[13] Others, such as Philippe Nonet, have responded that law can benefit from the social scientific studies of the world it tries to govern, and employ empirical knowledge to improve its normative judgments.[14] Although values cannot be generated out of facts alone, accurate accounts of the relationship between law and society can lay the basis for addressing normative issues arising out of the law's operations in society.

Following Waters, Travers appears to be leaving the examination of the normative content of rights to moral and political philosophy. The next chapter by Radha D'Souza challenges this suggestion indirectly by criticizing the rights discourse for its political and philosophical poverty. The concept of rights, which played a decisive role in the seventeenth and eighteenth centuries, transforming European societies from feudal systems to modern capitalist economies, has, according to D'Souza, lost its transformative emancipatory momentum and become meaningless to the vast majority of the world's population. For D'Souza, rights for their own sake have no value; what counts in the final analysis is human emancipation, with or without rights. In other words, rights become significant once they articulate a realistic and plausible strategy for freedom and human emancipation.

The impotence of rights, according to D'Souza, partly indicates the poverty of philosophy in the current times and partly reveals the challenges of poverty in the contemporary world. The impasse of rights discourse, she writes, 'is felt most in the Third World where for the vast majority of the people dislocation and destitution is a regular feature of life'. Displacement is an ongoing phenomenon that parallels colonial history and continues through 'globalisation'. It illustrates how rights claims are used to defend and alter the status quo in places such as Palestine, where rights are used in relation to property and place by claimants – those who have it and those who desire

12 B Turner, 'Outline of a theory of human rights', *Sociology*, 27 (1993), at 499.

13 D Black, 'The boundaries of legal sociology', *Yale Law Journal*, 81 (1972), 1086–1092, at 1092.

14 P Nonet, 'For jurisprudential sociology', in WM Evan (ed.), *The Sociology of Law: A Social-Structural Perspective* (New York: Free Press, 1980), at 58.

it. However, the latecomer or the new claimant cannot claim on the basis of existing rights. He or she must challenge the validity of existing rights in order to replace them with new norms of property, which tilt the balance in favour of the newcomers. The displaced persons, groups and nations protest against displacement, against the new rights introduced by the usurper, ultimately asking and wondering 'Why *me*?' The rights discourse, writes D'Souza, provides no answers to the question of why the latecomer's claim trumps the existing claims. As it regards the law, D'Souza argues, it privileges the new norms to the old ones when the newcomer succeeds in evicting those who had prior entitlements and, thus, appropriating their property.

In Chapter 4, Kate Nash narrows down the discussion to human rights and the way the rights of citizens in particular are realized, explaining that 'the enjoyment of rights is never simply a matter of legal entitlement; it also depends on social structures through which power, material resources, and meanings are created and circulated'. Nash starts with a warning about the dangers associated with pursuing a human rights strategy and ends with the intriguing insight that 'human rights are dangerous'. While Travers sees rights from without, using sociological theory and method to describe and analyse rights as social facts, and D'Souza engages directly with their normative core, Nash's approach appears to suggest the possibility of bringing together the normative and descriptive components of rights in one single approach.

Following Arendt's critique of human rights in *The Origins of Totalitarianism*,[15] Nash argues that human rights are untenable 'because they are based on the abstraction of humanity rather than any possibility of participation, whether democratic or revolutionary'. Moreover, these are the 'inalienable' rights, which, as Arendt pointed out, are in practice 'enjoyed by citizens of most prosperous and civilised countries'.[16] By insisting on legally extending the rights of the citizens of prosperous states to all humans irrespective of race, creed, culture, nationality, country of residence and socio-economic situation, the well-meaning supporters of human rights create five categories of citizens: super-citizens, marginal citizens, quasi-citizens, sub-citizens, and un-citizens.

In conclusion, Nash advocates a form of cosmopolitan law, which I understand as a global form of humanitarian law that 'can only advance as a result of political mobilization' and by building support for human rights within political communities. She also argues that there appears to be nothing in the logic of state formation to prevent cosmopolitan law. Nash can, arguably, be challenged on this point. For cosmopolitan law to be truly cosmopolitan, it must sidestep the conventional theory of sources of law, challenge traditional state sovereignty and become independent of the existing hierarchy of legal institutions for its interpretation and application.[17] If traditional international law is primarily about law regulating the relationship between the states, then cosmopolitan law is a legal order above the states and concerned with the fate of the individual and humanity as a whole. Thus, cosmopolitan law cannot be constructed as a state-centred legal regime, and, as such (as we shall see futher on in Chapter 14), it challenges the traditional forms of state.

The scope of discussions is further narrowed down in the next chapter by Paul Kearns, who provides 'the first detailed critique of artists' human rights *simpliciter*'. This chapter is neither sociological in the sense that Max Travers was proposing, nor normative in a philosophical manner. Instead, it carefully maps law at the national, European and international levels, portraying a troubled image of the relationship between law and the rights of artists to freedom of artistic expression. Law and lawyers usually pay little attention to the legal status of arts in general or

15 H Arendt, *The Origins of Totalitarianism* (San Diego: Harvest Books, 1968).

16 Arendt, ibid., at 279.

17 P Eleftheriadis, 'Cosmopolitan law', *European Law Journal*, 9 (2003), 241–63.