and 297(1). Part of the role of courts under UNCLOS is to answer these difficult questions and when they do so the Commentary reflects that jurisprudence admirably, even if the authors do not always agree with the decisions they are recording. No, insofar as many difficult questions have not yet been addressed by courts or in any other authoritative way. Here the best the Commentary can do is to reflect the range of views found in the literature, as for example in its treatment of prior notification by warships before entry into the territorial sea. In his foreword, Judge Golitsyn notes that the new Commentary will complement the earlier one rather than replace it. Necessarily there is some overlap, but the bulk of the new work takes this commentary well beyond anything attempted in the old. Yet there are gaps: nowhere in the discussion of Articles 194, 207 and 212 is there any mention of the Convention's relevance to the impact of climate change on the marine environment. This reflects most of the literature, but it is surely a glaring omission nevertheless.

Succinctly written, comprehensive in its coverage, and meticulously researched, this commentary does what its predecessor could not. Whether it lasts as well may be another question: the Achilles heel of a work of this kind is that it will be out of date ten years from now.

Alan Boyle*

Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis by Alan Greene [Hart Studies in Security and Justice, Hart Publishing, Oxford, 2018, 256pp, ISBN 9781509906154, £65.00 (h/bk)]

What is the right way to manage emergency situations in a democracy? The question has an old ring, taking us back to Bush, Blair and 11 September 2001, but the contagion of emergency the events of that day generated surely makes it as relevant as ever. Indeed the question might even be more pertinent now nearly two decades on, given the multiple ways in which special powers have come to proliferate around the world and how they may even, in combination, be ushering in a new way of understanding how the very idea of democracy works. Alan Greene wants to control emergency power in the name of old school democratic governance, and believes he has found a way, in this short, challenging but accessible book. First, things not to do—carry on as you always have may look good (defiantly civil libertarian and all that) but just ruins the ordinary law by planting within it seeds of destructive illiberalism. It is the same with special legislation—passed in a moment of anxiety, it hangs on far past its 'sell-by' date. Nor does David Dyzenhaus's 'argument in favour of robust judicial review … under common law constitutionalist orders' pass muster, 'highly persuasive' though it is (182). If we discount simple brazen illegality (once more popular than you might imagine), what is left? Greene argues for constitutions to provide for emergency powers, but to be so designed as not to give in to the first whiff of grapeshot as rival models of constraint so often do.

Pulling this off requires a bit of philosophical positioning, engaging great lives of the past (this was once a PhD after all). The big players here are that ubiquitous defender of brutal state power Carl Schmitt and the great proponent of law's foundational importance, Hans Kelsen. First Schmitt. Greene is very good at explaining how this compelling but disturbing thinker saw law as a creature of state power, flowing out of the exercise of that power and so subsidiary to it. What the constituent power can give it can also take away, and in the context of an emergency this inevitably means that the sovereign can both decide on an emergency's existence and on what it necessitates without any entanglement in law: the '[s]overeign is he who decides on the exception' in Schmitt's famous formulation. Kelsen in contrast saw the State as a legal order, rooted in norm after norm in an ascending hierarchy until you reached his famous 'grundnorm',

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simply presupposed or as Greene puts it, quoting Kelsen, 'the final postulate upon which the validity of all the norms of our legal order depends' (67–8).

What happens if Kelsen's beloved legal order hands—with perfect procedural correctness—total power to a despot? Greene will have none of this. Asserting 'that a state of emergency contained within a constitutional provision … cannot be explained by reference to the hierarchy of norms alone' (78), he reaches instead 'for a more embryonic power, ie constituent power; a power beyond law which establishes the constitution and legal order in the first instance' (78). The law must not allow permanent emergencies at the behest of an unaccountable executive since this would require a claim to 'a power that lies beyond the law and therefore such an argument cannot be grounded in law' (95). In fact a body 'exercising emergency powers must respect the constitutional constraints on the exercise of that power and, logically, there must also be constraints on this power for it to be legal' (78). Contra Schmitt and borrowing from Kelsen, Greene says that 'the power to declare a state of emergency, while exceptional in the sense that it must be exercised rarely, must nevertheless be located within the legal order' (78). Drawing a great deal from Dzyenhaus's analysis along similar lines, for Greene the required 'constraints must … be judicial in nature' (78). There is a lot here echoing the work on 'unconstitutional amendments' by scholars like Yaniv Roznai (*Unconstitutional Constitutional Amendments* Oxford 2017): 'An argument … that permanent emergencies are possible under constitutional emergency provisions must also contend with the concept of a declaration of a state of emergency acting as a proxy-constitutional amendment. It is not a power, however, that is a limited amendment power such as that envisaged [for example] by the Indian Supreme Court' (95). With Greene, therefore, we are in law's empire but it is one where the courts are active agents not amoral norm-spotters.

Will this engagement be effective? Greene is clear that judicial review '*must* be provided for in order to ensure that the decision to declare an emergency is done through law' (197). Is there a hint of desperation in the emphasis the author has deployed here, a fist on the table to hide vulnerability? When the famed Belmarsh decision declaring the detention of suspected international terrorists to be a breach of human rights was handed down, in December 2004 *(R (A) v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68), the government gleefully lighted upon the only judgment which had claimed oversight of what an emergency was, that of Lord Hoffman. How can he know? Who elected him? The rest of the majority, being more modest in their goals (was the response to the (accepted) emergency proportionate?), achieved more.

And even if we ride that particular wave how can we be sure that courts will play ball with the responsibilities heaped upon them by Greene? Terrorism is a peculiarly difficult creature for lawyers to tame, the laws based on it being rooted not only in what has happened but what might happen, and so far as the latter is concerned so awful are the consequences of even one atrocity that the slightest of risks might be thought to justify severe invasions of freedom. Exactly this sort of analysis underpinned the US Supreme Court's acceptance of (broadly speaking) McCarthyism in 1950s America: *Dennis v United States* 341 US 494 (1951). The (in Greene's words) 'innovative suggestions' by one US academic (Bruce Ackerman, *Before the Next Attack* (Yale 2006)) about how to control majoritarian excess here were somewhat undermined by the same author's acceptance of the discourse of extreme risk so far as terrorism is concerned; once this is accepted the juggernaut of Schmittian power becomes near-impossible for even independent judges to resist. In the end, what matters may not be only the structure of government but 'the spirit of constitutional fortitude and a fundamental belief in the rule of law' (198). Without these courts and lawyers are unlikely to protect a society from itself however the community has arranged its formal power structures.

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