POSITIVISM, HISTORY, AND THE RULE OF LAW

EVELYN ROSE MAUDE, UNIVERSITY OF TORONTO
IN CONVERSATION WITH: DAVID DYZENHAUS

Dr. David Dyzenhaus holds the the Albert Abel Chair of Law. After received his B.A. and LL.B. from the University of the Witwatersrand, he earned a D.Phil. from Oxford University under the supervision of Robert Dworkin. Widely travelled, he has held visiting fellowships or professorships at the University of Auckland, the University of Cambridge, New York University, and the Wissenschaftskolleg zu Berlin. He was awarded the prestigious Guggenheim Fellowship for the 2020-2021 academic year. A major figure in philosophy of law, Dyzenhaus has defended a distinctive non-positivist theory of law and also defended novel and influential interpretations of the positivist tradition. His major books include Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (1991; rev. ed. 2010), Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar (1997), and The Long Arc of Legality: Hobbes, Kelsen, Hart (2022). In this interview, we discuss his academic career, his views on philosophy and law, and what inspires his research.

Maude

You began your career in apartheid South Africa. How was that experience, and how has that background informed your career?

David Dyzenhaus

I went to university, as you've just said, during the apartheid era, and I studied law and political theory during my undergraduate years and then did the equivalent of a Canadian JD *[Juris Doctor degree]* thereafter. And this combination of law and politics got me thinking about the legal situation in South Africa. What interested me about that situation, and still continues to interest me, is that there was no written constitution with an entrenched Bill of Rights as we have in Canada. So judges couldn't strike down legislation. The government had been in power for a long time. It appointed the judges, it had a huge majority in the parliament, which was a parliament that was elected only by the adults within the white population. Yet somehow, despite the government's complete grip on law, it was possible for lawyers whom we would call today 'human rights lawyers' to try to resist apartheid law from within—that is, to use resources provided by the law itself to resist the legal oppression that was visited on the majority of South Africans by the apartheid government. And just why that's possible, why law provides a resource for the oppressed even as it's used as an instrument of oppression, is really the problem that I've worked on all my academic career.

Maude

You did your Doctor of Philosophy at Oxford in the 1980s. Which professors made the greatest impact on you during your time there?

Dyzenhaus

I started teaching in South Africa at my university, the University of the Witwatersrand, with just a BA degree and an LLB *[Bachelor of Legislative Law]* or *[the equivalent of]* JD. I didn't need a graduate degree in order to teach at the law school at that time. But I soon realized, because I was interested in philosophical issues about the law, that I needed to do graduate work. And it wasn't possible at that point to get a graduate degree done of the sort that I wanted to do in South Africa. There just wasn't really anyone around who could supervise it. So I decided to go to the United Kingdom and ended up in Oxford. At that time, Oxford was

the leading place in philosophy of law in the world. They had the three leading philosophers of law—Ronald Dworkin, Joseph Raz, and John Finnis. Ronald Dworkin was not someone who liked to supervise students, but I was, in a way, foisted on him by the university, because I think they'd got tired of the fact that he had been dodging supervisory obligations for a long time. At that point, I was a kind of legal positivist, and Joseph Raz was the leading legal positivist in philosophy of law. And I'd come to Oxford to write a kind of quasi-Marxist positivist thesis about apartheid law. But, under Dworkin's direction, I realized that I was interested in normative issues as well, so issues about why judges should decide cases in the way that one thinks correct. In my first supervision with Dworkin, I presented him with a kind of historical materialist analysis of apartheid adjudication, which focused on one case. And he talked to me about it for a while, and then he said of the judges who'd given conflicting opinions in this case: "Who do you think was right?" And I realized that I'd never really tried to answer that question. Trying to answer that question is really what I've been trying to do ever since.

Maude

Wow, that is quite the trio to have at your program!

Dyzenhaus

laughing) Yes!

Maude

Throughout your work, you've criticized legal positivism and offered an alternative theory of the relationship between law and morality. In a nutshell, what's wrong with legal positivism?

Dyzenhaus

Legal positivists tend to focus exclusively on positive law, the law that's enacted by officials who have authority to do so. And they neglect the fundamental principles that, following not only Dworkin but also the American legal theorist Lon Fuller, I think that legal orders need to instantiate in order to be legal orders. Once those legal principles come in to view, legal order comes to look a lot more complicated than positivists would have us believe.

What I've come to realize over the years is that positivists go much further than people

ordinarily suppose when it comes to recognizing these principles and what compliance with them entails. And so my views about legal positivism have changed over time. My thesis, which was then published as a book, *Hard Cases in Wicked Legal Systems*, pertained to adjudication in apartheid South Africa and the implications of a study of such adjudication for philosophy of law. In that story, the legal positivists were, in a way, the villain, the bad guy. Because I argued that the apartheid-era judges who'd given decisions which favoured the state had adopted a more or less positivist mode of deciding their cases.

But what I've come to see—and this is actually through teaching at the University of Toronto—is that there's much more depth to legal positivism than I'd previously supposed. And why this came about through teaching is that from time to time, and I'll be doing this next year again, I teach PHL271, which is the big undergraduate philosophy course that usually starts with around 300 students. And for some years some colleagues and I have put together a textbook for this course, and it starts with excerpts from Hobbes, which I selected. And some students would, each time I taught this course, challenge my interpretation of Hobbes, which is the orthodox view of Hobbes, the view that Hobbes is a kind of uncompromising authoritarian who regards the law as simply an instrument for the sovereign to use in order to implement his will. And students—remember, these are 200-level students—would fasten onto sentences in their extracts which I'd chosen and would tell me "No, actually, these sentences don't seem to fit with the picture of Hobbes you're painting for us." And I would find ways of explaining this way.

But after a while, I started to take their claims more seriously. And it lead to a complete reinterpretation of Hobbes on my part. And on that interpretation, Hobbes is the founder, in philosophy of law, of what I think of as a theory of the modern legal state. And I think that positivists who came after him – if we can term Hobbes a positivist, I don't think he really is – like *[H.L.A.]* Hart and then the great Austrian legal positivist Hans Kelsen, are trying to work out a theory of the modern legal state and of its authority. When working out a theory of its authority, they can't help but approach providing a theory of the legitimacy of that state. So my latest book, which has just appeared, is an attempt to reconstruct the positivist tradition of thinking about law as a theory about the legitimacy of the modern legal state. And with that reconstruction, the gap between what is usually thought of as the natural law tradition and the legal positivist tradition closes to almost nothing.

Maude

Your latest book is *The Long Arc of Legality: Hobbes, Kelsen, Hart. What inspired you to write it?*

Dyzenhaus

What inspired me to write the book was really just trying to make sense of problems that I'd come across as I tried to work out the initial problems which I'd started with as a graduate student. For one, I realized that there was much more depth to legal positivism than I'd previously supposed. But there was something new for me in the last several years: I started to become more and more intrigued by international law and the role that international law should play in constructing a general philosophy of law. And through talking to two of my colleagues—one of whom is now Dean of the Law Faculty, so the two international lawyers at the U of T law faculty —I came to realize more and more that international law, which is often seen by both lawyers and philosophers of law as an inferior kind of law, is actually central to an understanding of legal order, including the legal order of the state.

The legal philosopher who saw this most clearly was Hans Kelsen. Kelsen was really interesting. He started off in Austria as an academic lawyer. He was one of the main drafters of the first Austrian constitution. He invented the idea of a constitutional court that is a dedicated court to decide constitutional matters. And he sat on the first bench of that court in the 1920s, until he was forced off because of political pressures as Austria drifted to the right. He was also one of the last century's most prominent international lawyers. Kelsen thought, pretty much from the 1920s, that one couldn't give an account of legal order unless one gave a place in that account to the role of international law in constructing the legal orders of the modern state. Beginning to see that was probably the thing that inspired me most to start on this project—that is, trying to work out what kind of a role international law should have in philosophy of law.

Until recently the role of international law in Anglo-American philosophy was usually an afterthought for philosophers. So one can see, for example, in one of the classics of the last century, H.L.A. Hart's *The Concept of Law*, he postpones dealing with international law until the very last chapter. Finally, when he gets to international law, he's really not sure what to make of it. And that's a fairly standard strategy in Anglo-American philosophy of law.

Things have changed in the last few years. Philosophers of law have started to pay serious attention to international law, and with them, I've tried to find a way of building an account of international law into a theory of the state legal order.

Maude
Over the past two years, we've all had to adapt to teaching and learning online. How have you found that experience?

Dyzenhaus
Well, I'm in an odd position, because I'm in my second year of leave. So I had a year sabbatical due to me, and I happened to succeed in a fellowship application for something called the Guggenheim Fellowship. And the Guggenheim Fellowship comes with a year off teaching. And because the university doesn't like faculty to bank their sabbatical leave, to store up their sabbatical leave, I was more or less required—although I wasn't at all unhappy about this—to take a year's sabbatical leave immediately after the leave given to me by the Guggenheim Fellowship. So I haven't done all that much teaching during the pandemic!

However, in the first term of last year I did teach, with Jutta Brunnée, a seminar in the law faculty on the rule of law in international law theory. We'd wanted to teach this seminar together for quite a long time, and finally we had the opportunity to do it. Then I got the news of my fellowship, which got me the year off teaching. But because I wanted to teach this seminar with her, and neither of us would have taught this seminar by ourselves, I did teach it. So in the fall of the first year of the pandemic, we started off with a hybrid class, and then when the pandemic got worse, as we got closer to winter, the class went entirely onto Zoom. And going on to Zoom was, in a way, a bit of relief, because it's a very tricky thing to manage a hybrid class, so you have half the class in the room, half on Zoom, you're not quite sure what's happening to the people on Zoom, whether they really feel included. And once we all went on Zoom, and then everyone took their masks off, it felt like we were kind of all together in a way that we hadn't felt in the hybrid class.

Then in the fall term of last year, I was invited by New York University to come and teach for a semester. NYU, like U of T last term, had a very good grip on the pandemic, and even though

people weren't sure that we would get to the end of the term or semester in the classroom, we did. So I taught with a mask on, the students all wore masks, everyone was vaccinated, it all felt very safe. After a while, I forgot that I was wearing a mask in class.

As a result, I have not had the experience of teaching on Zoom from the beginning, so I just don't know what it would be like. I sincerely hope that in the future classes will be, as we say these days, in person, because I think it does make for a much better experience. I think this applies to very large classes as well. When I teach PHL271, which is the biggest class I teach, I still feel—I don't know what it feels like from the students' side—I still feel a connection in a large class that I don't feel in a Zoom session.

Maude

Throughout your career, you've studied concrete historical legal contexts—such as the fall of the Weimar Republic or South Africa in the era of the Truth and Reconciliation Commission. What lessons can we learn from the past for facing contemporary legal challenges?

Dyzenhaus

I think we can learn a lot. Because of where my interests in philosophy of law started—that is, in a situation in apartheid South Africa, where the rule of law was under severe stress—I've spent a lot of time working on other situations where the rule of law is under stress. And this is what lead me to study the legal situation of Weimar Germany. I was interested in what happened before 1933, when Germany had its first experiment with democracy and constitutionalism. After 9/11, I became very interested in law in emergency situations or purported emergency situations, as different countries around the world were crafting responses to what they regarded as international terrorism. I wondered, could those responses be made consistent with the rule of law and a commitment to constitutional values?

Now I'm working on a project which I call "The Politics of Legal Space." The inspiration for this project comes from a book by a German lawyer and political scientist called Ernst Fraenkel. Fraenkel was really interesting. He was a socialist and Jewish and managed to practice law in Berlin between '33 and '38, because he had an exemption from the general purge of Jews from the professions because he had served in the German military in the First World War. As

a result of his experience as a lawyer in Nazi Germany, he wrote a book called *The Dual State*. Fraenkel's thesis is that in order to understand the Nazi state, you have to understand it as two states side by side. On the one hand, there's what he called *the normative state*, which was the state which was left over from the Weimar period, in which law still functioned, right, so there were courts, law, you could sue someone in contract, criminal law worked, and so on. But next to that was what he called *the prerogative state*, and in the prerogative state Nazi officials did whatever they pleased, whatever they thought was in the interests of the Nazi party. And what's more, an official in the Nazi state could take a matter out of the normative state, yank it into the prerogative state, and do with it as the official pleased.

This idea of the prerogative state side by side with the normative state is a powerful idea, I think. At the moment, legal scholars in Hong Kong are trying to understand the way that law works as mainland China progressively exerts control over Hong Kong in terms of 'the dual state'. Many scholars around the world have become interested in this idea, as we see an accretion of power to the executive, as happened during the Trump presidency, it actually happened during Obama's presidency as well, and as is happening the United Kingdom now, the country where I'm now sitting. One gets elements of the prerogative state occuring within what I think of as the rule-of-law state, and that creates tensions which I think are really interesting to analyze.

I'll give you one example. I gave a talk, a webinar, for the Law faculty last seminar. And I got an email two days ago from someone in Alberta who had listened to this webinar and made a claim tha the Trudeau government's action in dealing with the truckers protest was an example of the prerogative state in Canada. So I had a brief exchange with this person. I don't think that's quite right. Why? Because the federal government acted in terms of a statute which was enacted after the Charter of Rights and Freedom. If one looks at that statute, it's pretty consistent with the rule of law and its application has to be consistent with the Charter of Rights and Freedom. So I think there's accountability with this emergency statute both to parliament, that is democratic accountability, and there's also accountability to the Charter of Rights of Freedoms through the courts. But still people are starting to think of the way our current world is working in these terms. So, I do think that the past has something to teach us when we're thinking about current events.

Maude

What, in your judgment, are the biggest questions that legal philosophers face in the future?

Dyzenhaus

Some legal scholars think that probably the biggest question that faces us all is a question for legal scholars—and that's the question of the environment. I'm not so sure that's a problem for me, right, in terms of philosophy of law. I agree that it's probably the existential problem that faces the world, but I'm not sure that rule of law really has any resources to offer us in dealing with this problem. It's not that I think that it's—well, I should put things more mildly. There's a very good book by a legal scholar at the University of British Columbia, a young scholar called Jocelyn Stacey about the rule of law and the environmental crisis. But it's a book which focuses more on how agencies that are set up to deal with the environmental crisis should respond to their mandate in a rule-of-law-like manner.

So what are the real rule of law problems that face us? Well, I think the big problem is the one I've already mentioned, and that is the gradual and now quite rapid increase in executive power. That's not only a rule of law problem, it's also a democratic problem. In the United Kingdom, those who fought for and succeeded in producing Brexit claimed that this was all about restoring the sovereignty of Parliament. However, what they really achieved was asserting the control of the executive over British public life. And there is, to go back to the last question, this creeping element of executive prerogative in our political lives.I think this development is problematic both for democracy and for the rule of law. So that's the main problem that I think scholars who work in my neck of the woods are going to face in the next few years.