

THE POLITICS OF LEGALITY

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“Even lawyers must recognise that history cannot simply be sealed off when a chapter such as the one we are leaving comes to an end, and certainly not when to do so would be to ignore the suffering and injustice done to millions”¹

INTRODUCTION

It is well established that all analysis and criticism of law rests on a normative framework that is either implicit in a work or explicitly defended. Arguments over the precise meaning of legality are not novel and patterns of legal argumentation often have remarkable continuity. The aim in this article is to examine a debate that has re-emerged among those unsympathetic towards legal positivism. An interesting dispute has resurfaced over the precise uses of legality and its determinacy or indeterminacy. The theoretical controversy has practical implications which are particularly evident in societies where law is under stress. The principal purpose here is to tell a different story about “critical” traditions in legal scholarship than is familiar: for the thesis is that the resources of the democratic tradition in modern law have not been exhausted. This scholarship offers a perspective on legality which has real explanatory power and critical potential.² In particular I focus throughout on the work

* This article is an extended review of Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) which tries to locate his work in a wider body of scholarship on democratic understandings of legality. Some of the research for this article was carried out while I was a Visiting Research Scholar at the University of Michigan Law School.

¹ Asmal, “Victims, Survivors and Citizens-Human Rights, Reparations and Reconciliation” (1992) 8 *South African Journal of Human Rights* 491, p 493.

² See, for example, in the US context Michelman, “Brennan and Democracy” (1998) 86 *California Law Review* 399, p 424; in relation to the persistent debate on the legitimacy of the judicial role he argues that the first and constant requirement of democratic justice would be: “Decisions that have to be reached about the rightness of basic political arrangements, that cannot be consensually reached, are nevertheless reached by institutions that are always effectively subjugated to the pressures of a public opinion-in-formation that is bent on democratizing itself and the legal and social conditions of its production.” On the republican revival see Michelman, “Law’s Republic” (1988) 97 *Yale Law Journal* 1493, pp 1526-1527: “Given plurality, a political process can validate a societal norm as self-given law only if (i) participation in the process results in some shift or adjustment in relevant understandings on the parts of some (or all) participants, and (ii) there exists a set of prescriptive social and procedural conditions such that one’s undergoing, under those conditions, such a dialogic modulation of one’s understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one’s identity or freedom, and (iii) those conditions actually prevailed in the process supposed to be jurisgenerative.” See also Sunstein, “Beyond the Republican Revival” (1988) 97 *Yale Law Journal* 1539. For criticism see Bell and Bansal, “The Republican

of Dyzenhaus. The intention is to provide both an extensive introduction to the thought of this important legal theorist and defend the trend of which his work is a part. The suggestion is that his work is an important contribution to the debate. But more importantly it forms part of an emerging neo-republican or social democratic body of legal scholarship which is deeply sceptical about both naïve liberal triumphalism and the direction in which some “critical” legal scholarship has gone. This neo-republican revival comes at an important time in the debate on constitutionalism in the United Kingdom. It is essential that the insights gained are fed into the current disputes on constitutional change. A distorted, and thus partial, conceptual framework will impact severely on the terms in which this debate is conducted.

My argument is that this neo-republican framework is of use to constitutional lawyers approaching the difficult task of mapping the “unwritten constitution” in the fragmented context of multi-layered governance. How else do we begin to map the transnational conversations involving judges, politicians, non-governmental organisations and corporations which are altering the way we think about legal and political discourse? My thesis is that the democratic concept of legality outlined here should underpin this process.

I defend this thesis in two basic stages. First, I trace the development of Dyzenhaus’s understanding of legality and his contribution to the broader debate on law and democracy. This includes an examination of: legality and legitimacy; law in the Weimar Republic; and the law and politics of justification. His is a valuable contribution to a body of contemporary work that expresses unease about aspects of critical legal scholarship. What is important is that this criticism does not come from the usual quarters. The work claims that a critical tradition of social democratic scholarship is being neglected and thus the intellectual resources it provides ignored. This is a critical tradition with practical implications for “real-world” legal contexts. Second, I examine Dyzenhaus’s recent work on South Africa, specifically his exploration of the Legal Hearing of the South African Truth and Reconciliation Commission (TRC). This includes: an outline of the work of the TRC; and thoughts on the judicial role. The theoretical argument advanced in this article speaks directly to the dilemmas faced by constitutional lawyers in states where law is under stress. The case-study is a useful way of testing some of the claims advanced about legality. As he has noted, all South African lawyers who opposed apartheid faced the question of how, or if, law could be used to resist law.³ This is precisely the issue that confronts all critical scholars who do not believe that “really existing liberal democracy” is the end of the story or the “end of history”.

Revival and Racial Politics” (1988) 97 *Yale Law Journal* 1609. For a republican concept of the legitimacy of law see Pettit, *Republicanism: A Theory of Freedom and Government* (1997), pp 252-253.

³ Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 *South African Journal of Human Rights* 11. In South Africa this was translated into the question of whether the common law “gave judges a genuine resource to interpret statute law in ways that modified the oppressive intentions of the legislators”, p 13.

LEGALITY AND LEGITIMACY

Judging and Argumentation

In any political struggle a time comes when thought must be given to law's potential for achieving change. Most individuals and groups making interventions in the public sphere will consider the available legal mechanisms. If a government has proved resistant to legislative reform then the political struggle may enter the courts. While this raises numerous practical questions for the participants it also raises fascinating issues for legal scholars considering law's potential for making a political and legal difference. In this context the movement in constitutional thinking toward models of legal argumentation is helpful.

Debates about the rule of law are commonplace in legal scholarship, yet these are arguments which go beyond the law school. Dyzenhaus's work can be usefully understood as part of a democratic defence of legality and indirectly as a critical response to modern trends in "critical legal scholarship." There is growing concern that exposure of radical indeterminacy does not lead to politically progressive results. Scholars have, for example, shown that indeterminacy has been used in the past by right-wing authoritarians to undermine constitutional regimes. If there is a theme that dominates Dyzenhaus's work it is that legal positivism, and with it the plain fact approach to law, does not encourage sound legal practice. It is the argument that a theoretical position about the nature of law can have a practical impact on how judges do their work. The focus is on adjudication and, like Dworkin, he views judges as central to legal practice.⁴ One can take issue with this, and Dyzenhaus does recognise that judges should not have the last word on how to describe their social practice.⁵ This remains a narrow focus and it is important to remember other strands of legal thought that explore the way legality is constructed in wider society and therefore far removed from the courtroom.

There are several difficulties faced by those who reject positivism but wish to retain a concept of legality. The most serious problem for those anti-positivists who defend a substantive concept of legality is the "wicked legal system": in other words, states that use law primarily for the purpose of oppression. The modern debate on this subject can be traced to Hart and Fuller's exchanges on the contribution made by legal positivism to national socialism in Germany.⁶

Dyzenhaus has gone to some lengths to demonstrate the validity of his thesis. In his first major work he used a case-study of judicial interpretation of apartheid laws to examine the arguments of legal positivists and their critics.⁷ It is necessary to summarise his earlier

⁴ Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991), p 269. See also Dyzenhaus, "Judges, Equity and Truth" (1985) 102 *South African Law Journal* 295; Dyzenhaus, "The Disappearance of Law" (1990) 107 *South African Law Journal* 227.

⁵ *Ibid.*, (1991), p 213. See also Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), pp 179-193.

⁶ See Hart, "Positivism and the Separation of Law and Morals" reprinted in Hart, *Essays in Jurisprudence and Philosophy* (1983), p 49; Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630.

⁷ *Op cit.*, n 4. For criticism see Hartney, "Dyzenhaus on Positivism and Judicial Obligation" (1994) 7 *Ratio Juris* 44; Sypnowich, "Social Justice and Legal

position. Circumstances in South Africa brought these debates into sharp focus and more detailed consideration is given to the issue below. The South African government placed great emphasis on its use of legalism. Legality could potentially offer a cloak of respectability for apartheid and where possible the government used it in this way. Serious questions were thus raised for the legal profession and the judges who participated in this legal order. The judges have been extensively criticised for their executive-mindedness. Dyzenhaus attributes this to the dominance of the plain fact approach to interpretation. The decisions “greased the wheels of racial segregation and they allowed the security arm of government to suppress political opposition to that policy unhindered by judicial review”.⁸ His reference to Cover’s work on the role of the judges in enforcing the Fugitive Slave Law in the United States is of interest.⁹ Cover’s argument is that judges held onto a mechanistic interpretation as a comfort when they faced moral problems with the law they were being asked to confront.¹⁰ Formalism offers comfort to judges when presented with serious moral problems about the activity they are engaged in. This mechanistic approach need not, however, promote restriction. As Abel has noted, in the South African context, most judges honoured clear statutory language even though it led to conflict with the government and did not accord with their political preferences.¹¹ Dyzenhaus argues that it is legal positivism which plays the key part in the reasoning of judges who adopt this approach. In his early work he makes a spirited defence of the common law tradition and suggests that the approaches of Fuller, Dworkin and Habermas are the most convincing. It is to Dworkin that he looks for an adequate critique of positivism.¹² The Dworkinian approach did, however, face a particularly acute problem when applied to the South African legal order: for if the role of the judge is to provide the best coherent justification of constitutional values then many judges might have found themselves extending, rather than eroding, apartheid. Legal positivists argue, with some justification, that Dworkin’s is yet another romantic attempt to revive the common law tradition. One potential consequence is that judges may gain legal authority for a decision that is not merited. Through a historical analysis of South African law Dyzenhaus tries to shed some light on this debate with the aim of defending the potential of the common law tradition. The claim made against the plain fact approach is a serious one: it lends legitimacy to executive policies which would be illegal if judged by substantive legal

Form” (1994) 7 *Ratio Juris* 72. And for a response see Dyzenhaus, “The Legitimacy of Law: A Reply to Critics” (1994) 7 *Ratio Juris* 80.

⁸ *Op cit*, n 4, p 214.

⁹ Cover, *Justice Accused: Anti-Slavery and the Judicial Process* (1975). See generally Minow, Ryan and Sarat (eds) *Narrative, Violence, and the Law: The Essays of Robert Cover* (1995).

¹⁰ *Ibid*, (1975). See Sebok, “Legal Positivism and American Slave Law: The Case of Chief Justice Shaw” in Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999), p 113; he rejects Cover’s emphasis on formalism and suggests it was a much more subtle form of legal positivism. Cf Nelson, “The Impact of the Anti-Slavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America” (1974) 87 *Harvard Law Review* 513.

¹¹ Abel, “Legality Without a Constitution: South Africa in the 1980s” in Dyzenhaus (ed) *op cit*, n 10, p 66, p 73.

¹² Despite the many limitations of his work Dworkin remains the leading contemporary critic of legal positivism, see Dworkin, *Law’s Empire*, (1986); Dworkin, *Taking Rights Seriously*, (1978).

standards.¹³ These substantive legal standards are to be found within the common law tradition. Demonstrating that a jurisprudential position is directly responsible for particular outcomes is not easy. There are many factors which impinge upon the decision-making process. Much weight is placed on the practical implications of the plain fact approach and in particular it is suggested that judicial creativity is blocked.¹⁴ Even contemporary legal positivists, such as Raz, do not escape the accusation that their interpretation encourages the plain fact approach. No doubt an activist judiciary, spurred on by progressive legal scholars, might have offered some form of meaningful resistance to the apartheid legal order. In the United Kingdom those inspired by Dworkin's argument have had some success within the context of a political movement to encourage a more activist judiciary. Ultimately one is still left wondering whether this is the best way to promote democratic values or discourage apathy and quietism. This is not to deny the power of this concept of legality but to caution against an exaggerated belief in the judicial role. It is in rather more mundane locations that one suspects the most important action happens.

Life Beyond Dworkin

The understanding that emerges in Dyzenhaus's early work is perhaps over indebted to Dworkin's insights on interpretation and legal theory. It is in the combination of perspectives (Fuller, Habermas and Dworkin) that a more persuasive democratic argument surfaces. Fuller's interactive understanding of legality as a relationship between the citizen and the state, when linked to Habermas's work on the legitimacy of legality, is promising.¹⁵ The reason is that they have constructed strong arguments for a democratic understanding of law. In other words, they are able to defend a critical understanding of legality against legal positivism. In this model justification, argumentation, contestation and the provision of reasons assume priority. As Dyzenhaus notes, adopting this conception of legality means that the debate does not end with the primary legislative decision.¹⁶ The emphasis is on encouraging judicial creativity by stressing the nature of the common law tradition as a process of contestation. This is similar to Habermas's critique of Weber's understanding of law. Habermas argues that Weber linked modern law to enactment and thus broke any connection to rational agreement.¹⁷ What Weber misses with his narrow positivism is a conception of rational justification. The concept of legitimacy is thus tied to a form of "decisionism" and a belief in the legality of enacted rules and the right of those who rise to positions of authority to issue commands.

Dyzenhaus's early work has attracted criticism. Many would question the centrality accorded to the courts and the veneration of the common law tradition. By placing adjudication and creative interpretation at the heart of a concept of legality he invites the fairly obvious criticism that the life of law appears in practice to happen at some distance from the appellate courts. Critics will find much support for the argument that the common

¹³ *Op cit*, n 4, p 209.

¹⁴ *Ibid*, p 247.

¹⁵ See Fuller, *The Morality of Law* (1964).

¹⁶ *Op cit*, n 4, p 267.

¹⁷ Habermas, *The Theory of Communicative Action Vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (1987), p 263. Habermas is another in a line of theorists to have given serious thought to the nature and role of modern law; see Symposium Issue, "Habermas on Law and Democracy: Critical Exchanges" (1996) 17 *Cardozo Law Review* 767-1684.

law does not impress as a vehicle for the promotion of progressive politics. The welfare state is a creature of legislation and its creation met with some judicial resistance. In other words, it is to statute law that we most often turn for concrete defences of values such as equality. Dyzenhaus's response is inadequate. He argues that we do not have a problem defending parliamentarism even though there were past exclusions. Parliamentary democracy rests on a foundation of democratic principle: an element of legitimacy which the common law tradition notably lacks. He is, of course, aware of this problem. That is precisely why Dworkin, Fuller and Habermas prove so attractive. Each of these theorists recognise and attempts to answer, in different ways, this problem of legitimacy and justification. Dworkin and Habermas are relevant for another reason which will become apparent – for when we talk of the role of interpretation, and its centrality for legal theory, we are faced with the problem of how creative we want our judges to be.

More than Words? Legal Interpretation and the Life of the Law

The linguistic turn in philosophy has had an impact on many disciplines, including legal scholarship.¹⁸ Placing language at the centre of argumentation has a serious impact on traditional understandings of some of the basic building blocks of legal scholarship. For example, take Rorty's position on truth:

“Truth cannot be out there – cannot exist independently of the human mind – because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own – unaided by describing activities of human being – cannot.”¹⁹

Rorty is interested in metaphor, conceptual novelty and self-invention and suggests that a liberal utopia would be a poeticised culture.²⁰ The languages of law are revived by metaphorical tropes and processes of redescription rather than external changes in the world. To try to understand what this might mean in practice think of the recent debate on human rights in the United Kingdom.²¹ Rorty might see the arguments

¹⁸ See generally Rorty, *Philosophy and the Mirror of Nature* (1980). For an introduction to hermeneutics see Grondin, *Introduction to Philosophical Hermeneutics* (1994).

¹⁹ Rorty, *Contingency, Irony and Solidarity* (1989), p 5. For criticism see Habermas, *On the Pragmatics of Communication* (Cooke ed, 1998), pp 343-382.

²⁰ *Ibid.*, (1989), p 65. For an interesting exchange of views see Baker, “‘Just do it’: Pragmatism and Progressive Social Change” (1992) 78 *Virginia Law Review* 697; Rorty, “What can you Expect from Anti-Foundationalist Philosophers?” (1992) 78 *Virginia Law Review* 719, p 719: “Good prophets say that if we all got together and did such and such, we would probably like the results. They paint pictures of what this brighter future would look like, and write scenarios about how it might be brought about. When they're finished doing that, they have nothing more to offer, except to say ‘Lets try it!’ (a phrase I prefer to ‘Just do it!’).”

²¹ Much has been written on this development see, for example, Feldman, “The Human Rights Act 1998 and Constitutional Principles” (1999) 19 *Legal Studies* 165; Young, “The Politics of the Human Rights Act” (1999) 26 *Journal of Law and Society* 27; Leigh, “Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth” (1999) 48 *International and Comparative Law Quarterly* 57; Ewing, “The Human Rights Act and Parliamentary

over the Human Rights Act 1998, and the political movement using these discourses, as attempts at metaphorical redescription of constitutional law and practice. The arguments that eventually are successful are not those that can claim validity against some external check but rather those that “work”. Constitutional change initiated by the United Kingdom government is simply the replacement of old metaphors with a new revived self-image. It is important to stress that Rorty would not criticise this as inauthentic for this is precisely how change occurs for him. Rorty’s focus on the contingency of language is a deliberate attempt to undermine any claim to universal validity and thus stands in sharp contrast to Habermas. Basically Rorty is arguing that we must still hold onto and argue for what we believe in on the basis that it runs no deeper than “contingent historical circumstance”.²² He is worried about the type of “prophet” who thinks of herself as a messenger from somebody or something:

“Such prophets think of themselves as not just one more voice in the conversation, but as representative of something that is somehow *more* than another such voice.”²³

What does this mean for human solidarity?²⁴ For Rorty the key is not to search for something shared but rests with “the imaginative identification with the detail of others’ lives”.²⁵ The sense of solidarity is stronger the more local the “one of us” is. Solidarity is best defended, he argues, by extending the “us” and not arguing from “humanity”. The argument is that this process of extension is best achieved by empirical descriptions of particular forms of pain and not by philosophical treatises. One can therefore understand why Rorty views all forms of literature as a part of this process. Rorty’s pragmatism is a useful example of where the linguistic turn can lead. The left have found this version of pragmatism frustrating and some believe that it is a rather complacent perspective.²⁶ Rorty’s response is surprise at the “radical” belief that a “really powerful philosophy could break down all the resistance to radical social change by dissolving all the old fears and prejudices”.²⁷ He thinks that the left’s turn to theory is motivated largely by despair. He may well have a point.

Given the place of textual interpretation in legal scholarship it is not difficult to see why the linguistic turn has proved so attractive to traditional and critical legal scholars. Critical scholars have joined analytic

Democracy” (1999) 62 *Modern Law Review* 79; Bamforth, “Parliamentary Sovereignty and the Human Rights Act 1998” [1998] *Public Law* 572; Hunt, “The ‘Horizontal Effect’ of the Human Rights Act” [1998] *Public Law* 423. For a welcome note of caution see Tomkins, “Of Constitutional Spectres” [1999] *Public Law* 525, p 539: “The Human Rights Act 1998 and the devolution arrangements will alter the balance of power in the constitution, enhancing the position of the judiciary at the expense of Parliament, but the Crown’s government marches on. The Crown remains the constitutional powerhouse... Until that is changed... any new constitutional order will look remarkably like the old one.”

²² *Op cit*, n 19, p 189.

²³ *Op cit*, n 20, p 719.

²⁴ For a critical perspective see Geras, *Solidarity in the Conversation of Humankind: The Ungroundable Liberalism of Richard Rorty* (1995).

²⁵ *Op cit*, n 19, p 190.

²⁶ See, for example, Hutchinson, “The Three ‘R’s’: Reading/Rorty/Radically” (1989) 103 *Harvard Law Review* 555.

²⁷ *Op cit*, n 20, p 723.

philosophers in “colonising” linguistic philosophy and, while welcoming the recognition that Hart and Dworkin have given to the importance of language, continue to reject their arguments. From a critical perspective the constructed nature of legal discourse offers new clothes for a very old argument. There is a problem for critical scholars wishing to pursue this agenda. It can be demonstrated briefly by mentioning some arguments advanced by Fish.²⁸ Fish argues that law cannot have a purely formal existence as any specification of what the law is will be infected by interpretation and thus challengeable. What is interesting is that Fish does not then proceed, as critical scholars do, to debunk the indeterminate and incoherent nature of legal discourse. Instead Fish marvels at law’s ability to create and recreate itself out of the very materials it pushes away. It is inescapably pragmatic and inconsistency is what makes law work.²⁹ The beauty of law for Fish is precisely this process of self-creation. He is not troubled by the insight. In fact he revels in law’s mechanisms for replicating itself. This conservative response blunts the critical nature of scholarship that highlights indeterminacy. Accepting Fish’s view of things would change the focus towards the local conditions of persuasion, the reasons that work and the leverage that can be achieved in practice by invoking law’s normative claims.³⁰ But even this is to go beyond what Fish would accept.³¹ The reason for introducing this is to suggest why Dworkin and Habermas are of such interest. They are leading critics of this style of relativism and sceptical thinking and have, I believe, demonstrated its flaws. Both Dworkin and Habermas, however, recognise the importance of this turn to language and construct their arguments within it. Habermas in particular has engaged extensively in this debate and his work will be of interest to those who are initially suspicious of “linguistic idealism”. I suggest that this is why Dyzenhaus has found the work of these scholars so attractive for they provide the critical tools to address the challenge of some strands of critical legal scholarship.

Criticism of this democratic understanding is not confined to postmodern theory. Legal positivists are also critical because he appears to be making a very old mistake. Fagan, for example, argues that there is no connection between legal positivism and the plain fact approach and therefore that the critique is a non-starter.³² He rejects the assumption that the validity of a legal theory should be dependent on the desirability of its practical effect.³³ Dyzenhaus’s focus can also be contrasted with that of Abel’s work on the use of law in the struggle against apartheid³⁴ and Lobban’s examination of the work of the courts at trial level.³⁵ These are discussed in more detail below.

²⁸ See, for example, Fish, *There’s No Such Thing as Free Speech and its a Good Thing, Too* (1994).

²⁹ *Ibid.*, p 169.

³⁰ *Ibid.*, p 171.

³¹ See Fish, “Liberalism Doesn’t Exist” (1987) 6 *Duke Law Journal* 997; Fish, “Still Wrong After all These Years” (1987) 6 *Law and Philosophy* 401; Fish, “Anti-Professionalism” (1986) 7 *Cardozo Law Review* 645; Fish “Wrong Again” (1983) 62 *Texas Law Review* 299; Fish, “Working on the Chain Gang: Interpretation in Law and Literature” (1982) 60 *Texas Law Review* 551.

³² Fagan, “Delivering Positivism from Evil” in Dyzenhaus (ed) *op cit.*, n 10, p 81, at p 103.

³³ *Ibid.*, p 111.

³⁴ Abel, *Politics by Other Means: Law in the Struggle Against Apartheid* (1995).

³⁵ Lobban, *White Man’s Justice: South African Political Trials in the Black Consciousness Era* (1996).

Dyzenhaus's defence of a democratic understanding of law has taken him squarely into modern critical debates in legal theory. Some trends in modern legal and political theory reject key elements of the modernist enterprise which underpin traditional legal theory. There are a variety of ways to respond to this modern intellectual trend. One is to view it as irrelevant and ignore it. While at times understandable this rests uneasily with claims that dialogue and rationality are central to modernism. Another, and more challenging, task is to recognise the limitations of traditional notions of rationality and construct a model that is more resilient and provides a basis for continuing critique. This has the advantage of demonstrating that the understanding of reason in contemporary theory is inadequate but, as Habermas's energetic efforts have demonstrated, it is not without its difficulties and can present formidable challenges.³⁶ Allied with this defence of rationality are those which highlight the worrying parallels between some modern intellectual trends and theorists from the past. Linking current arguments to events from other periods of history has a number of advantages but also poses significant problems. On the positive side it can help to show that no matter how many inflated claims to novelty, the old and familiar controversies reappear. More problematic is any suggestion that a particular theoretical position necessarily has deleterious consequences. Legal theorists of contingency and indeterminacy are motivated by genuine concerns about orthodox models of rationality. Critical legal scholars highlight the role of indeterminacy as an empowering notion. The contingency of legal discourse is viewed as having potential for political struggle. Critical scholars believe that legality may simply mask unjust social relations. The emphasis on indeterminacy is not intended to encourage the violent overthrow of the current constitutional legal order, as is at least implied by Scheuerman's use of analogy, but to empower groups to see law as a contingent resource, the utility of which is dependent on context. This allows political engagement with law to take place but discourages romantic myths about law's imperial ambitions. The difficulty for critical scholars who decide that this is their preferred approach is how precisely they intend to avoid Fish's conservative conclusions. When responding it is worth remembering Cover's view:

"When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from the other."³⁷

There is a danger that Fish's rather attractive view of legal discourse will encourage paralysis. For the asylum-seeker or the prisoner, or any other vulnerable group, law's words have more than purely aesthetic meaning and function. The words of the law can inflict, and authorise the infliction of, real pain.³⁸ This is why our concepts must enable critical practice rather than stifle it.

³⁶ See Habermas, *The Theory of Communicative Action Vol. 1: Reason and the Rationalization of Society* (1984); Habermas *op cit* n 17. For an accessible guide see Dryzek, "Critical Theory as a Research Program" in White (ed), *The Cambridge Companion to Habermas* (1995), pp 97-119. A more detailed examination of communicative rationality can be found in Cooke, *Language and Reason: A Study of Habermas's Pragmatics* (1994).

³⁷ Cover (1993) *op cit*, n 9, p 203.

³⁸ *Ibid*: "Legal interpretation takes place in a field of pain and death."

RECONSTRUCTING LEGALITY: LAW AND POWER IN THE WEIMAR REPUBLIC

It is difficult to understand the work of Habermas without recognising that the ghost of the collapse of the Weimar Republic haunts virtually all of his endeavours.³⁹ The failure of constitutionalism in Weimar has left a legacy that flows through many important strands of political and legal theory. History offers important lessons for modern debates in legal theory. Much of what is now regarded as novel is the legacy of past struggles. As technological progress pushes us into new fields of scholarship, arguments still seem to oscillate between core positions which are familiar and can be easily charted historically. This is not to suggest that there is “nothing new under the sun”. It is to argue that there are patterns of thought which are in tension. Fragmentation, diversity and difference are the themes which dominate discussions in modern democracies. The “fact of pluralism”⁴⁰ raises the old problem of social order and the place of law in securing it. By returning to other periods when similar themes were openly discussed it is possible to achieve a measure of distance from modern-day argument while also gaining valuable insights. This is precisely the direction Dyzenhaus has gone in his recent work and it is thus necessary to explore this debate here.

Constitutional theorists are naturally drawn to different historical periods and the experience of constitutionalism in other societies to test their arguments. Both South Africa and the Weimar Republic in Germany have proved attractive to contemporary scholars of constitutional law and history. The problems experienced by the Weimar regime, and the role of leading German intellectuals in this, has drawn much recent attention. Rawls in the introduction to the paperback edition of *Political Liberalism* argues that one cause of the fall of Weimar’s constitutional regime was that the “traditional elites of Germany” did not support its constitution and were not prepared to “make it work”.⁴¹ In the end these groups “no longer believed a decent liberal parliamentary regime was possible”.⁴²

A recurring theme in Dyzenhaus’s work is his belief that law can constrain power. In other words, that law can make a difference. In trying to defend this he has confronted perhaps the most persistent apologist for the ubiquity of power and strategic manipulation in law and democracy: Schmitt. There is growing interest in Schmitt’s work in critical quarters. One reason is the strength of his critique of liberalism. Another, and as noted by Mouffe, is that to advance a theory of liberal democracy that might prove persuasive to citizens theorists need to engage with those who have challenged the fundamental tenets of liberalism.⁴³ This will allow us to acknowledge what Schmitt claims is a paradox inscribed in liberal democracy.⁴⁴ The renewed interest in Schmitt is intriguing for surely he is not the intellectual figure to lead us into the next century.

³⁹ McCormick “Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises in the State” (1997) 9 *Yale Journal of Law and the Humanities* 297, p 298. He also notes that Habermas’s work cannot be understood without acknowledging the framework that Weber left behind.

⁴⁰ Rawls, *Political Liberalism* (1996). See also Rawls, “The Idea of an Overlapping Consensus” (1987) 7 *Oxford Journal of Legal Studies* 1.

⁴¹ *Ibid.*, (1996), lxi.

⁴² *Ibid.*

⁴³ Mouffe, “Carl Schmitt and the Paradox of Liberal Democracy” in Dyzenhaus (ed) *Law as Politics: Carl Schmitt’s Critique of Liberalism* (1998), p 158.

⁴⁴ *Ibid.*

In an attempt to explore these subjects Dyzenhaus has examined debates in German constitutional law and history. The German constitutional context has provided fertile ground for thinking on constitutionalism in recent years, in particular among those interested in the fate of social democratic law and politics. By looking again at the debate concerning legal positivism and Nazism in detail Dyzenhaus hopes to defend his thesis that “positivism discourages sound legal practice”.⁴⁵ He also wants critical scholars to make use of the resources available within social democratic political and legal theory. These debates are specific to the constitutional context of the society studied. It is, however, evident that there are similarities with current work in Anglo-American legal theory. That there is no necessary link between work which seeks to expose the indeterminacy of law and progressive politics is one immediate lesson. The post cold-war era has brought in its wake not the “end of history”, or a new world order, but the assertion of often aggressive forms of identity and group life. Globalisation is being met with new and familiar forms of exclusion. In this context it is worth asking whether a persistent emphasis on indeterminacy and contingency is helpful. The rise of neo-conservatism in social and political theory in modern times is another notable trend. A number of critical traditions in modern legal theory stress the inherently political nature of law and unearth the strategic power struggle which is claimed to lie behind law’s pretensions. There is little that is particularly new in this claim.⁴⁶ But it is against these scholarly trends that Dyzenhaus and others are reacting.

From Dyzenhaus’s work interesting connections can be made to modern trends in legal theory.⁴⁷ Dyzenhaus views Schmitt’s thought as paving the way for the coming to power of the Nazis. His position is similar to that of Scheuerman who argues that Schmitt’s marriage to national socialism resulted from core elements of his jurisprudence.⁴⁸ Scheuerman, however, argues that the political direction was dictated by Schmitt’s attempt to “solve” the indeterminacy dilemma.⁴⁹ In other words, Schmitt became frustrated with the failure of liberal law to offer determinate outcomes. There are two ways of reading this. The first is that this is the problem with seeking to follow the formalist quest and the second is that Schmitt simply pushed the radical indeterminacy thesis to its limits. Scheuerman, as well as Dyzenhaus, clearly believes the second to be more persuasive. This is a serious assertion which is not accepted as fair or accurate by some.⁵⁰ What is accepted by a number of scholars is that much can be

⁴⁵ Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Germany* (1997), p 1. See also *op cit*, n 4.

⁴⁶ Cf Griffith “The Political Constitution” (1979) 42 *Modern Law Review* 1.

⁴⁷ Note in this respect Salter’s review of Dyzenhaus’s book [1998] *Public Law* pp 340-342.

⁴⁸ Scheuerman “After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order” (1998) 11 *Cardozo Law Review* 1743. See also Scheuerman “Constitutionalism and Difference” (1997) XLVII *University of Toronto Law Journal* 263; Scheuerman “Free Market Anti-Formalism: The Case of Richard Posner” (1999) 12 *Ratio Juris* 80, p 94: “As the ideal of the rule of law loses its status as an icon in American Jurisprudence, those who traditionally have benefited most from it - the pariah, the economically vulnerable, the criminally accused, the dissenter - are now likely to suffer most.”

⁴⁹ *Ibid*.

⁵⁰ See Goldberg, “Let Liberals Be Liberals” (1998) 61 *Modern Law Review* 899. For a critical view of the work of Scheuerman, Dyzenhaus and others see Ulmen “ ‘Integrative’ Jurisprudence and Other Misdemeanors” (1999) 77 *Texas*

learned from the work of this corrosive critic of liberal democracy.⁵¹ At the centre of Schmitt's political theory is a conception of the friend/enemy distinction which he maps onto the idea of the culturally homogeneous nation state.⁵² Schmitt develops this into a substantial critique of liberal democracy. His critique of liberalism, and what he views as its inherent contradictions, has a modern resonance. The claim is that liberalism is an avoidance of political decision that is an enterprise in concealment. Liberalism presents itself not as one ideology among many but as the natural state of affairs and in an important sense as an apolitical ideology. The contradiction of being anti-political and inherently political is the predicament of liberalism. Rather than reject Schmitt's argument Dyzenhaus, as with Mouffe, sees valuable lessons for liberalism in it, notably, "liberalism has yet to show that it can offer a convincing account of democratic citizenship".⁵³

Schmitt is notorious for what Habermas calls his "spectacular support for the Nazis".⁵⁴ His anti-Semitism cannot be brushed aside in any consideration of his life and work.⁵⁵ Nevertheless his critique of liberalism remains important for friends and enemies of liberalism alike.⁵⁶ In *The Concept of the Political*⁵⁷ Schmitt makes his famous statement that "[t]he specific political distinction to which political actions and motives can be reduced is that between friend and enemy".⁵⁸ The essence of the political is thus the ability to make this distinction. A community is no longer a politically free people if it allows the distinction to be made by others.⁵⁹ The target of this work is liberalism. It is accused of equivocation and a general inability to make such distinctions.⁶⁰ Claimed neutrality is problematic from a number of perspectives. First, it masks the way

Law Review 1107. See also Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944* (1963), p 463: "It is true that relativism and pragmatism contain authoritarian elements. By denying the validity of objective truth, they may pave the way for the adoration of the existing. But at the same time they are debunking theories; they are critical doctrines, deflating the arrogant claims of post-Kantian idealism... *No philosophy can be held responsible for National Socialism* [emphasis added]."

⁵¹ See, for example, Mouffe, "Carl Schmitt and the Politics of Liberal Democracy" in Dyzenhaus (ed), *Law As Politics: Carl Schmitt's Critique of Liberalism* (1998), p 159.

⁵² See Dyzenhaus, "'Now the Machine Runs Itself' Carl Schmitt on Hobbes and Kelsen" (1994) 16 *Cardozo Law Review* 1.

⁵³ *Ibid*, p 19.

⁵⁴ Habermas *op cit*, n 17 p 108; Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate* (1989), pp 128-139. See also Arendt, *The Origins of Totalitarianism* (1951), p 339: "[t]otalitarianism in power invariably replaces all first-rate talents, regardless of their sympathies, with those crackpots and fools whose lack of intelligence and creativity is still the best guarantee of their loyalty." In a reference she notes the case of Schmitt "whose very ingenious theories about the end of democracy and legal government still make arresting reading."

⁵⁵ Dyzenhaus *op cit*, n 45, pp 98-101.

⁵⁶ Or as Dyzenhaus puts it "liberalism. . . can learn from one of its most implacable enemies" *op cit*, n 45, p 38.

⁵⁷ Schmitt, *The Concept of the Political* (1996).

⁵⁸ *Ibid*, p 26.

⁵⁹ *Ibid*, p 49.

⁶⁰ It is evident that Mouffe is influenced by his critique, see Mouffe, "Political Liberalism: Neutrality and the Political" (1994) 7 *Ratio Juris* 314.

liberalism deals with those who do not wish to follow its doctrine. Second, it cannot defend itself from intervention by rival interest groups and is thus prone to capture by these forces. For Schmitt there is no rational way to judge between competing ideologies. What is required is a choice. He accuses liberalism of failing to offer any systematic treatment of the state or politics, and thus as purely concerned with individual freedom and private property. The critique is familiar, liberalism is criticised for its exclusive interest in individualistic notions of freedom, with the role of the state limited to securing the conditions for liberty to exist and blocking any infringements on freedom.⁶¹ Schmitt's fear appears to be that liberalism will succeed in "depoliticising" life in the political community. A further aspect of his work is his emphasis on the "we" that is, the importance of a well-defined and homogeneous community. The enemy in the friend/enemy distinction is thus *our* enemy. By focusing on context, and the concrete, the ambition of his work is to reject forms of rationality which seek justification in universal moral principles. These principles are simply masks for strategic manipulation and power relations. On state theory Schmitt was firmly opposed to the pluralism defended by Laski, among others. Because of its power over the physical life of people to declare the enemy the political community is dominant over all other associations in society.⁶² In dealing with the enemy, and this includes physical killing, there can be no rational justification or normative basis. Enemies which pose an existential threat to the political community can only be dealt with politically. There is no issue of justice which arises in war. Any notion of a just war simply disguises a political purpose. Schmitt appears to be making the "realist" point that this struggle is a fact which will not disappear simply because individuals wish to disguise reality with idealistic abstractions. For Schmitt then:

"If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear."⁶³

He is also critical of the use of humanity as a justification for war. To refer to humanity is for Schmitt simply an attempt to adapt a useful tool for self-serving purposes. By waging conflict in the name of humanity the most inhumane tactics become permissible. He draws upon Hobbes' argument that the belief that each side is in possession of the true, the just and the good gives rise to the worst types of conflict.⁶⁴ In this critique of humanitarianism Schmitt has the League of Nations in his sights. Many of the themes raised again have a contemporary resonance.

In his attempt to become the twentieth centuries' Hobbes, Schmitt worked from a definition of sovereignty famously tied to the exception.⁶⁵ The sovereign is he who decides on whether an extreme emergency exists and what is to be done about it. The exception here defined is not just any emergency but one of unlimited authority when the entire existing order is suspended.⁶⁶ While the law disappears the state remains. Legal order is here not based on a norm but on pure decision. The absolute decision

⁶¹ *Op cit*, n 57, p 71.

⁶² *Ibid*, p 47.

⁶³ *Ibid*, p 53.

⁶⁴ *Ibid*, p 65.

⁶⁵ Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985), p 5. See also Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (1996).

⁶⁶ Schmitt (1985) *ibid*, p 12.

removes itself from all normative ties.⁶⁷ For legal order to exist there must be a normal state of affairs and the sovereign is the entity that decides whether this exists. The reason for placing emphasis on the exception for Schmitt was that it conflicted with rationalist attempts (Kelsen's in particular) to make the law appear as a gapless unity. The exception thus becomes the rule and shows the reality ready to break through rationalist legal theory. On this Schmitt identifies Kelsen as the leading exponent of liberal legal theory. He finds Kelsen's pure theory problematic. Kelsen's legal science cannot be normative because the jurist can only make use of values which already exist.⁶⁸ The unity and purity of the system only seems plausible because everything that would contradict it is effectively excluded.⁶⁹

Other aspects of Schmitt's thought of particular interest include his belief that liberalism and democracy are fundamentally opposing concepts:⁷⁰ an argument which was first worked out fully in *The Crisis of Parliamentary Democracy*.⁷¹ That such a tension exists will come as no surprise to public lawyers. Much of the scholarly debate today in public law still reflects the variety of ways of addressing this issue.⁷²

There is much to learn from Schmitt's assault on liberalism. His critique of liberal legalism in particular bears similarities to recent trends in critical scholarship. There has been a revisionist attempt to rescue his reputation by casting him as someone alive to the problems of liberal democracy and thus concerned to show how it might be defended against its enemies. Although superficially plausible, it does not bear much scrutiny. Schmitt has been subjected to severe attack from those who find his politics detestable and his theories lacking in sophistication. Dyzenhaus is critical of those who are little more than apologists for Schmitt's political beliefs and activity, but recognises the strength of his critique of liberalism. It is worth noting that the power of Schmitt's criticism has been questioned. The arguments are so focused on Kelsen that one wonders about their general applicability to the variety of forms of liberalism that exist. It is also not always clear that contradiction causes liberalism the sort of problems Schmitt (and others) think it does. However, Dyzenhaus's willingness to take his arguments seriously has obviously been advantageous for the purposes of constructing a democratic defence. More importantly it has focused attention on those German social democratic theorists who had a different constitutional vision.

BUILDING A POLITICAL AND LEGAL CULTURE OF JUSTIFICATION

The Trouble with Proceduralism

If Schmitt's critique of liberalism has some of the strengths claimed for it then what repairs might be made to the edifice. It is suggested in this article, and in the work of a growing number of legal scholars, that the key lies in the construction of a democratic understanding of legality. Dyzenhaus looks to Habermas as the modern leading critic of Schmitt. As

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, pp 20-21.

⁶⁹ *Ibid.*, p 21.

⁷⁰ For critical comment on this see Dyzenhaus *op cit*, n 45. Cf Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996).

⁷¹ Schmitt, *The Crisis of Parliamentary Democracy* (1985).

⁷² See Loughlin, *Public Law and Political Theory* (1992).

he notes, Habermas's critique of the "remnants of the unreason of Nazism in Germany" is important, as is his attempt to show how the undermining of legal order helped pave the way for the Nazis.⁷³ In this he has, somewhat controversially, described Schmitt as a legitimate pupil of Weber. Habermas's work delivers a rich understanding of democracy precisely because, unlike political liberals, he welcomes democracy for non-instrumental reasons.⁷⁴ It is the only way to sustain the "culture of justification" on which the legitimacy of law rests.⁷⁵ Dyzenhaus ultimately finds what he terms Habermas's "transcendentalism" problematic.⁷⁶ He argues that Habermas steps outside law and politics in order to construct a grounding for these.⁷⁷ The result is numerous problems particularly with regard to his co-originality thesis.⁷⁸ Habermas's settled position on the connected nature of the rule of law and democracy is attractive for constitutional lawyers in particular. He dissolves the tension in an ambiguous way by claiming that they arise together in the rational reconstruction of the constitutional state. In other words, citizens must choose what rights to grant one another when deciding to regulate their common existence in accordance with law. The precise nature of this link is not altogether clear and Alexy has rejected the argument that it resolves the collision between public and private autonomy in practice.⁷⁹ Habermas, however, argues that the relation results from the concept of modern law itself and the fact that law can no longer draw its legitimacy from a higher law:⁸⁰

"Modern law is legitimated by the autonomy guaranteed equally to each citizen, and in such a way that private and public autonomy reciprocally presuppose each other."⁸¹

⁷³ Dyzenhaus *op cit*, n 45, p 235. See also Dyzenhaus, "The Legality of Legitimacy" (1996) XLVI *University of Toronto Law Journal* 129, p 134: "While his academic work is usually so abstract and complex as to defy easy comprehension, let alone obvious contact with reality, we can make this contact by understanding his work as a response to the way in which Weber's account of law and politics had some part to play in undermining the role of legal order as a potential bulwark against the Nazi seizure of power."

⁷⁴ *Ibid*, p 244.

⁷⁵ *Ibid*. See also Mureinik, "Emerging from Emergency: Human Rights in South Africa" (1994) 92 *Michigan Law Review* 1977. *Op cit*, n 73, p 162: "On Habermas's view, what is important about democracy is not that it makes possible positive law which reflects desires and preferences. Rather what democracy makes possible is positive law that is the result of citizens' deliberating about their desires and preferences by seeking to justify to each other what should be done in the name of the common good. Claims to rightness or truth about what I believe to be the case are then not mere cloaks for my brute desires, but claims that I am prepared to justify in public debate. I should be open to changing my views about what is right for me as well as for others in the light of deliberation."

⁷⁶ *Ibid*, pp 248-49.

⁷⁷ Cf Rawls *op cit*, n 40, pp 372-434.

⁷⁸ *Ibid*, p 249.

⁷⁹ Alexy, "Basic Rights and Democracy in Habermas's Procedural Paradigm of Law" (1994) 7 *Ratio Juris* 227, p 237.

⁸⁰ Habermas, *The Inclusion of the Other: Studies in Political Theory* (trans. Cronin, 1998), p 254.

⁸¹ *Ibid*. Cf Raz, *The Morality of Freedom* (1986).

The important point to note is that because private and public autonomy mutually presuppose each other then neither human rights⁸² nor popular sovereignty can claim primacy over the other.⁸³ For rights in the private sphere to be adequately protected individuals must come forward into public life and explain and justify their problems and needs. If one is seeking equality through law then the basis on which equal treatment is to be granted must be assessed through public discussion.⁸⁴ The legal regulation of the private and the public is thus connected. This linkage of public and private autonomy is most evident in the law and politics of equality. But there is reason to share Alexy's concern that in practice the two will continue to collide. When collisions do occur it is not evident that the co-originality thesis will assist a decision maker charged with reaching a substantive conclusion. If this is the case then it casts some doubt on the practical value of the procedural model that Habermas advances.

There is good reason to retain the broad thrust of Habermas's thesis on modern law. To be sure, Habermas's philosophical position is complex, and he takes a rather long road to defend his understanding of rationality, but it is questionable whether it can be said to be completely "outside" law and politics. By highlighting what is taken for granted in any attempt to reach understanding, the theory finds its way into any legal and political context. These are the normative presuppositions which are there in any attempt to reach agreement. The difficulty is that the practical implications can be far from clear. This is one of the most frequently heard criticisms of Habermas's argument yet it misses what is at the core of his project. By offering only a highly minimalist approach he is being true to his commitment to substantive proceduralism. In other words, it is no longer the place of the philosopher to offer a substantive theory of justice to be imposed on participants. This contrasts sharply with Dworkin's result-oriented view of law and democracy.⁸⁵

The philosophical reference to proceduralism in Habermas's work is often seriously misunderstood. It is nothing to do with promoting a substance-less legal or political theory or with a formalistic understanding of legal procedures. The commitment is in fact to a radical and dynamic understanding of law and democracy which fully reflects familiar social democratic legal and political positions. Legal authority here rests on interaction between citizens and government and not in a hierarchical top-

⁸² For an attempt to ground a justification of human rights from discourse theory see Alexy, "Discourse Theory and Human Rights (1996) 9 *Ratio Juris* 209. See also Alexy, "Rights, Legal Reasoning and Rational Discourse" (1992) 5 *Ratio Juris* 143, p 151: "Discourse theory is no machine which determines the weights of rights exactly, objectively, and definitely, *but it shows that rational argument about rights is possible* (my emphasis)."

⁸³ *Ibid*, p 261. See also Habermas, "Human Rights and Popular Sovereignty: The Liberal and Republican Versions" (1994) 7 *Ratio Juris* 1.

⁸⁴ Cf Dworkin, *A Matter of Principle*, (1985), p 32: "I may have made it seem as if democracy and the rule of law were at war. That is not so; on the contrary, both of these important political values are rooted in a more fundamental ideal, that any acceptable government must treat people as equals."

⁸⁵ Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (1996), p 34: "I see no alternative but to use a result-driven rather than a procedure driven standard...The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with these conditions."

down model. However, solutions to concrete problems can only be worked out by participants themselves in real-world dialogue. Like Rorty he is not convinced that theory can offer a substantive conception of the good life to be imposed on citizens. He departs from Rorty by claiming universal validity for the communicative model of rationality. Habermas's contribution is to show that there is more to all this than Weberian instrumental reason. The theorist can reconstruct the normative presuppositions which this dialogue always and everywhere implies but this is as much as can be done. This minimalism can be frustrating and has led to suggestions that it is empty of ethical content or that it is so abstract from any concrete positions that it provides no reason to act in one way or another.⁸⁶ Dyzenhaus finds the universalism inherent in his work problematic. Although recognising the contribution to a democratic understanding of law he finds his universalism "potentially dangerous".⁸⁷ This is where the German constitutional context again becomes important. Habermas does not want his theory to be dependent on the peculiarities of one particular political community. His understanding of rationality is intended to be universal in its scope. And this is where one suspects that the Nazi experience in Germany looms large. To abandon universalism to the contingency of current democratic practices leaves insufficient space for challenge to the rise of reactionary movements. In contrast to this, Dyzenhaus wants Habermas to accept the contingency of law and morality and their links to deliberation in the national context.

Heller and Social Democratic Law

Although convinced by aspects of Habermas's argument he ultimately rejects it. Dyzenhaus chooses to return to a previously neglected figure. He regards the work of Heller as useful for the purpose of confronting his reconstruction of Schmitt's thought.⁸⁸ As he acknowledges, Heller's work is little known outside Germany. He was in fact a minor figure in comparison to Kelsen and Schmitt and he died young in exile in Republican Spain. However, he argues that his theory solves many of the problems which plague Habermas's transcendentalism. Here we must rely on Dyzenhaus's translation of Heller's work. Heller defends the legitimacy of law on the basis of a connection between law and morality.⁸⁹ The moral value served by law is that of collective self-government.⁹⁰ The value of self-government is not solely about individual self-ownership. It concerns citizens deciding together on the rules to govern their collective existence.⁹¹ The concept of autonomy is one which encompasses both the

⁸⁶ White, *The Recent Work of Jürgen Habermas: Reason, Justice and Modernity* (1988), p 69.

⁸⁷ *Ibid*, p 177.

⁸⁸ *Ibid*, pp 161-217, pp 247-258. See also Dyzenhaus, "Hermann Heller and the Legitimacy of Legality" (1996) 16 *Oxford Journal of Legal Studies* 641; Kennedy, "The Politics of Law in Weimar Germany" (1999) 77 *Texas Law Review* 1079; MacCormick, "Jurisprudence, Democracy and the Death of the Weimar Republic" (1999) 77 *Texas Law Review* 1095.

⁸⁹ *Ibid*, p 253.

⁹⁰ Kennedy *op cit*, n 88, p 1091: "Heller's third way, then, adds this possibility for solving the crisis of law and politics in a democracy: the people are sovereign through processes of political conflict and debate institutionalised in parties and parliament. But this sovereignty must have a real basis in citizenship, which, for Heller, meant the material conditions of equality."

⁹¹ *Ibid*. Note Dyzenhaus *op cit*, n 88, p 653: "Politics for him [Heller] is conflict but a conflict whose precondition is the renunciation of physical force as the means for settling disputes. The political is the struggle between conflicting

public and the private. This act of self-government is not one exercised in any once and for all way, but always in the knowledge that revision is possible. At the centre of this conception of legality and legitimacy is the citizen. However, as Dyzenhaus states:

“The conscientious citizen is the guardian of legitimacy, but the conscientious citizen is first and foremost a democrat, not a liberal”.⁹²

He puts considerably more weight on the strength of Schmitt’s critique of liberalism than some would agree that it merits.⁹³ This impacts on his conclusion, which is that liberalism’s fall need not be into the abyss of a “god on earth”.⁹⁴ It must simply “accept its fall into democracy”.⁹⁵ Liberalism is a political position which is open for public debate within democracy. Reason and truth are not about solitary individual enlightenment but public debate within a process of dialogue. It is in an active understanding of citizenship that an adequate democratic concept of legality must rest.

As I suggest in this article Dyzenhaus’s work is best regarded as part of a debate on legality presently re-emerging. The patterns of thought may be familiar but the context is constantly altering. Globalisation and the Europeanisation of law are two contexts that spring immediately to mind. Many of the themes which are prominent in Dyzenhaus’s work can also be found in the writings of Scheuerman.⁹⁶ He too is concerned about the recent interest in Schmitt and reconstructs the work of some early Frankfurt school theorists (Neumann and Kirchheimer) to defend a democratic understanding of the rule of law. Scheuerman follows others in making the link between Schmitt’s writings on constitutionalism and

parties to influence or determine the terms of social co-operation. And that requires in turn that disputes are settled on a basis which justifies a description of the state’s decisions as securing co-operation and not mere co-ordination.”

⁹² *Ibid*, p 254. Habermas’s position is similar. For thoughts on the judiciary as citizens see McCormick “Habermas’s Discourse Theory of Law and Democracy: Bridging Anglo-American and Continental Legal Traditions” (1997) 60 *Modern Law Review* 734, p 742: “Habermas’ radical conclusion is that even the most egalitarianly inclined liberal theorists of judicial decision making, such as Rawls and Dworkin, are potentially authoritarian. . . through their insistence on a single judicial mind, rather than one that communicates with, and can persuade, and be persuaded by other rational minds.”

⁹³ See Goldberg *op cit*, n 50.

⁹⁴ *Ibid*, p 257

⁹⁵ *Ibid*.

⁹⁶ See Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (1994), p 7: “an examination of Neumann and Kirchheimer is absolutely indispensable if we are successfully to take on the intimidating intellectual and political figure of Carl Schmitt, who was not only Weimar Germany’s premier right-wing authoritarian political thinker but an active Nazi after 1933 and an important theoretician of many facets of fascist law.” Note the following comment: “Schmitt’s embrace of German fascism was anticipated by key elements of his thinking about the dilemma of legal indeterminacy – well before Hitler’s rise to power”, Scheuerman, “Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt” (1996) XVII *History of Political Thought* 571.

modern “deconstructive” criticism.⁹⁷ He finds Schmitt’s critique of liberal constitutionalism untenable and points to a general lack of precision in his work. Part of the problem, he suggests, is Schmitt’s exclusive concentration on Kelsen. While Kelsen is one of the leading figures in legal positivism he is not the sole exponent of the theory. However, by taking on Kelsen he felt he had defeated liberal constitutionalism. The reality, however, is that he “reproduces the weaknesses of a highly idiosyncratic. . . version of modern liberal jurisprudence. . . [and] surrendered its most worthwhile achievements”.⁹⁸ It is beyond the bounds of this article to go into detail on Neumann and Kirchheimer’s intellectual development. It is sufficient to note that they can be located within that body of social democratic theory which is highlighted in this article. Scheuerman’s point is that their work has been neglected and that it offers an instructive social democratic alternative to Schmitt’s authoritarianism. In this he is in agreement with Dyzenhaus who believes that theorists of the left have not made adequate use of these intellectual resources. Scheuerman’s arguments are interesting critical alternatives to what is becoming the norm in critical legal scholarship. He questions some of its central tenets. Key themes which emerge in Scheuerman’s analysis include the suggestion that legal regulation is not bound to fail because of complexity or indeterminacy. This casts doubt on the argument that deregulation can be justified purely because of complexity. He suggests that it is too easy to use social complexity as an excuse for yet another vague standard in the legal system.⁹⁹ The more likely explanation, suggested in his work, is that formal law confronts powerful forces in favour of delegalisation. The disadvantaged gain nothing from this trend. For Scheuerman, it is no coincidence that many “blanket clauses” which invite informalism are to be found in highly contested spheres of social and economic life. In the context of regulation, and the need for the legislature to decentralise activities, the phrase “no regulation without representation” (which he uses) is particularly apt.¹⁰⁰ Again the concept of the rule of law advanced in his work is a democratic one grounded, as with Dyzenhaus and the theorists that he uses, in the notion of self-government. The social democratic understanding of law that emerges from this diverse body of work is persuasive. If there is a criticism it is the failure to address in a specific way the critical tendencies they mention. Dyzenhaus remedies this problem to some extent with his engagement with scholars such as Schmitt and Habermas. Habermas, in particular, has constructed a formidable defence of modernity against contemporary postmodernists and poststructuralists. The concept of legality that he advances is more robust precisely because of the willingness to acknowledge current critical scholarship. What this suggests is that critical scholars must have a secure normative basis for their critique of empirical developments if the critical project is to offer a meaningful challenge to traditional versions of constitutionalism. As I have demonstrated in this section of the article this critical project must be able to take legality, and its potential to control arbitrary power, seriously.

⁹⁷ Scheuerman, “Carl Schmitt’s Critique of Liberal Constitutionalism” (1996) 58 *Review of Politics* 299, p 300. See Scheuerman (ed.) *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (1996).

⁹⁸ *Ibid.*, (1996), p 322.

⁹⁹ *Op cit.*, n 96, p 212.

¹⁰⁰ *Op cit.*, n 96, p 216.

LAW, TRUTH AND RECONCILIATION IN SOUTH AFRICA

In the remaining sections of this article the critical understanding of legality as examined is put to work exploring a particular issue. The aim is to see what light this casts on the truth commission debate; in particular the question of how we judge the judges in a process of transition. For the sake of protecting judicial independence should they remain free of scrutiny or does the theoretical position defended here mandate us to view them as accountable citizens in a democratic polity? South Africa provides a useful case-study because the TRC there held a Legal Hearing to assess in practice many of the issues which inform this article. Dyzenhaus recognised the potential for a concrete assessment of his own ideas and it is his work on the TRC that is the specific focus here.

How to deal with the past is a question which confronts individuals and societies. For the individual, and from a psychoanalytic perspective, addressing the past can be part of a therapeutic process of healing. The healing element arises from its internal and not purely external aspect.¹⁰¹ It works effectively only as an internal process of self-reflection. This is about assuming responsibility for the self-deceptions we have allowed to dominate our lives and shaping a coherent sense of selfhood. In postmetaphysical modern conditions this search for self-understanding is a part of everyone's life. In the absence of a master plan, applicable for and to all, we can only orient ourselves in the world through self reflection. This can be mapped onto modern societies struggling to "work off" the past by moving from the "I" to the "we" of modern citizens. How should, for example, societies emerging from conflict deal with the past? Can the healing process work for societies as well as individuals? One option is to try to forget the past, and with it any attempt to acknowledge the truth on an official basis, by viewing the new beginning as a fresh start where backward glances only re-ignite the controversies which fuelled the conflict. In practice the trend in many states is to establish a truth commission. There are a number of reasons for this. As a preliminary point, it is important to stress that a truth commission, if created, is only one part of a process of transition. It does not eradicate the need for institutional reform. The establishment of a truth commission need not be inconsistent with domestically conducted criminal prosecutions. Therefore, although the grant of amnesty was a matter for the truth commission in South Africa there is no necessary connection between the two issues.

The establishment of some form of truth commission is becoming a regular feature of transitional justice.¹⁰² The latest report has come from the Historical Clarification Commission in Guatemala¹⁰³ and there are calls for the establishment of a truth commission in, for example, Rwanda.¹⁰⁴ The usefulness of a body like this in a transitional period is not immediately obvious. Utility is not how they necessarily should be

¹⁰¹ Habermas, *A Berlin Republic: Writings on Germany* (1998), p 17. See also Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (1998), pp 168-178.

¹⁰² States that have established a commission include: Argentina; Bolivia; Chad; Chile; El Salvador; Germany; Guatemala; Haiti; Nigeria; Philippines; Sierra Leone; South Africa; and Uganda.

¹⁰³ Historical Clarification Commission, *Guatemala: Memory of Silence*, <http://hrdata.aaas.org/ceh/index.html>.

¹⁰⁴ Sarkin, "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda" (1999) 21 *Human Rights Quarterly* 767.

assessed and in practice they tend to be justified for a mixture of instrumental and non-instrumental reasons. In addition, it is difficult to imagine how one would measure the success or failure of a truth commission. The lack of precision makes it problematic for any political community to judge whether a truth commission is something it should have.¹⁰⁵ Popkin and Arriaza argue that perhaps the greatest achievement in the Latin American context was getting an official presentation of an authoritative history which confronted the previous regime's account.¹⁰⁶ The human rights community in particular has some reason to be cautious. First, there is a danger, evident in the more spirited defences of these bodies, of infusing the search for truth with mythical or religious significance. This can be troubling for the secular human rights movement. Second, it raises a question about international law and the grant of amnesty. For example, Sarkin argues that international law would not permit the granting of amnesties for the crimes committed in Rwanda.¹⁰⁷ This is part of a trend to place international legal obligations on states to prosecute those responsible for gross violations of human rights. But if a political community opts for a democratically-mandated amnesty how should international lawyers respond?

So given these cautious words, what reasons might be advanced to justify the creation of a truth commission? Asmal has suggested the following: (1) recognition of the illegitimacy of the previous regime; (2) avoidance of sanitised history; (3) neglecting history now will only rekindle resentment; (4) confrontation with the roots of violence; (5) if a new order is being borne, can reconciliation flow simply from the bare assertion of the new order's existence?; (6) avoidance of revenge; (7) truth and justice matter and reparations are not enough.¹⁰⁸ These are powerful arguments. There are, however, few straightforward answers to the many issues which arise in the field of transitional justice.¹⁰⁹ While it is in the institutional nature of law to construct its self-image on principle, in practice pragmatism often underpins the difficult task of crafting the transition to democracy.¹¹⁰

The Origins, Structure and Work of the TRC

The process of officially investigating the human rights abuses of the past is being undertaken in an increasing number of countries.¹¹¹ One way the truth can be investigated is by the creation of a commission to examine past abuses and report on its findings. The South African example is of particular interest to legal scholars because of the well-known debate there

¹⁰⁵ See Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past" (1995) 20 *Law and Social Inquiry* 51.

¹⁰⁶ Popkin and Arriaza "Truth as Justice: Investigative Commissions in Latin America" (1995) 20 *Law and Social Inquiry* 79.

¹⁰⁷ *Op cit* n 104.

¹⁰⁸ Asmal *op cit*, n 1, pp 492-499. See also Asmal, Asmal and Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* (1996), pp 6-11.

¹⁰⁹ See Méndez, "In Defense of Transitional Justice" in McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (1997), p 1.

¹¹⁰ Berat and Shain, "Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase" (1995) 20 *Law and Social Inquiry* 163.

¹¹¹ Hayner, "Commissioning the Truth: Further Research Questions" (1996) 17 *Third World Quarterly* 19.

on the role of the judges and the legal profession. As Malleon has noted, the South African judiciary have benefited significantly from the “constitutional redistribution of power in the new South Africa”.¹¹² The Bill of Rights and the new Constitutional Court have raised the profile of the judiciary. There are other reasons why the judiciary have attracted attention. The one of interest here is their relationship to the truth commission.

Reference to the idea can be traced to the final clause in the interim Constitution of 1993. More precisely, it can be linked to the internal politics of the African National Congress (ANC). As Hayner has noted, the ANC is the only known example of a non-government entity which has established its own commission to examine and report on past human rights violations.¹¹³ The criticism (which eventually led the ANC to create a commission to examine abuses that were taking place in detention camps) came from a group of formally active ANC members who had been detained by the organisation.¹¹⁴ While Mandela accepted collective responsibility for the ANC leadership the movement did raise questions about the accuracy of the report of the first commission. A new commission was appointed shortly after the first completed its work and its report called for the creation of a truth commission to examine abuses by both sides during the conflict.¹¹⁵

The interim Constitution directed the Parliament to adopt a law which would provide a mechanism for granting amnesty for conduct “associated with political objectives and committed in the course of the conflicts of the past”.¹¹⁶ The type of justice involved in this instance was reconstructive

¹¹² Malleon “Assessing the Performance of the Judicial Service Commission” (1999) 116 *South African Law Journal* 36, p 36. See also Sarkin “The Political Role of the South African Constitutional Court” (1997) 114 *South African Law Journal* 134.

¹¹³ Hayner, “Fifteen Truth Commissions – 1974-1994: A Comparative Study” (1994) 16 *Human Rights Quarterly* 597, p 625.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, p 633.

¹¹⁶ “This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend divisions and strife of the past, which generated gross violation of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date which shall be the date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. With this Constitution and

justice “a mode of justice which seeks institutional transformation through the examination of the wrongs of the past”.¹¹⁷ Its creation was marked by a widespread process of consultation making it a novel exception to similar ventures in other states.¹¹⁸ The TRC was established by the Promotion of National Unity and Reconciliation Act 1995.¹¹⁹ Its objectives were “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”.¹²⁰ This was to be achieved by: establishing “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date. . .”;¹²¹ facilitating the granting of amnesty “to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective. . .”;¹²² establishing the whereabouts of victims and giving them an opportunity to tell their own stories;¹²³ and compiling a comprehensive report on its activities.¹²⁴ There were three committees created to carry out the tasks of the TRC. First, the Committee on Human Rights Violations was responsible for the conferral of victim status and for government reparations.¹²⁵ Second, the Committee on Amnesty is responsible (the work of this Committee is still ongoing) for assessing amnesty applications from those who have committed gross human rights violations. It has the power to grant immunity from civil and criminal liability.¹²⁶ This is noteworthy because the issue has usually been divorced from the prosecution versus amnesty debate in other jurisdictions. Third, the Committee on Reparations and Rehabilitation was responsible for the preparation of a report which formed the basis for reparations and rehabilitation to victims and advice to the President.¹²⁷ The TRC has extensive powers under the Act (as amended¹²⁸) to initiate and coordinate inquiries into, for example, the identity of persons involved in gross violations of human rights and accountability for such violations.¹²⁹ It began its work in December 1995 and in October 1998 presented its final comprehensive report to the President. Perhaps the most problematic aspect of its work has been the grant of amnesties from

these commitments we, the people of South Africa, open a new chapter in the history of our country;” – extracted from the epilogue to of the South African Interim Constitution 1993. See P. Parker, “The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting” (1996) 17 *Human Rights Law Journal* 1: “No transfer of power could have taken place had some variant of a war crimes tribunal or Nuremberg proceedings been envisaged.”

¹¹⁷ Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998), p 6.

¹¹⁸ Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998), pp 53-5.

¹¹⁹ s 2(1).

¹²⁰ s 3(1).

¹²¹ s 3(1)(a).

¹²² s 3(1)(b).

¹²³ s 3(1)(c).

¹²⁴ s 3(1)(d).

¹²⁵ s 3(3)(a) and Chapter 3.

¹²⁶ s 3(3)(b) and Chapter 4.

¹²⁷ s 3(3)(c) and Chapter 5.

¹²⁸ Promotion of National Unity and Reconciliation Second Amendment Act 1997, Promotion of National Unity and Reconciliation Amendment Act 1997, Promotion of National Unity and Reconciliation Amendment Act 1995.

¹²⁹ ss 4(a)(iii) and (iv).

civil and criminal liability.¹³⁰ The trading of truth for amnesty did not go unquestioned. This is unsurprising given the emphasis in international law, and within the international human rights community, on accountability and the prosecution of those responsible for serious human rights violations.¹³¹ The grant of amnesty to participants in governmental and non-government entities has proven to be one of the more controversial aspects of transitional justice. It raises, in a stark manner, the pragmatic measures that are regarded as necessary in processes of conflict resolution. Members of the families of murdered political activists decided to launch a challenge to rules on amnesty.¹³² The applicants argued that the amnesty provisions of the 1995 Act were not authorised by the Constitution because they denied their right, under Section 22 of the interim Constitution,¹³³ to have justiciable disputes settled by a court of law or other impartial forum. The Constitutional Court ruled that the epilogue to the Constitution sanctioned a limitation to the right of access to the court in accordance with the Constitution. To summarise, amnesty for criminal liability was permissible because it would be difficult to find the truth without it and this would assist in the process of reconciliation and reconstruction. As Mahomed DP noted:

“Even more crucially, but for a mechanism providing for amnesty, the ‘historic bridge’ itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimised by abuse but also those threatened by the transition to a ‘democratic society based on freedom and equality’. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming. . . (footnotes omitted).”¹³⁴

He recognised that South Africa was not alone in dealing with these issues and referred to Chile, Argentina and El Salvador.¹³⁵ But the comparison only served to confirm, in the Court’s view, that there was no single or uniform international practice in relation to amnesty.¹³⁶ The Court concluded that the amnesty provisions were a key element of the final settlement and it might not have been achieved without them.¹³⁷ The

¹³⁰ By December 7, 1998, 7,124 applications for amnesty had been received. At this stage in proceedings 216 had been granted amnesty.

¹³¹ See Dugard, “Retrospective Justice: International Law and the South African Model” in McAdams (ed) *op cit*, n 83, p 269.

¹³² *Azanian Peoples Organisation (Azapo) and others v The President of the Republic of South Africa* 1996 (4) SA 671 (CC).

¹³³ The relevant section provided: “(e)very person shall have the right to have justiciable disputes settled by a court of law or where appropriate, another independent or impartial forum.”

¹³⁴ *Op cit* n 132, p 685.

¹³⁵ *Ibid*, p 686.

¹³⁶ *Ibid*, p 687.

¹³⁷ *Per* Mahomed DP p 698: “In the result I am satisfied that the epilogue to the Constitution authorised and contemplated an ‘amnesty’ in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.”

judgment has been criticised for its treatment (or, more accurately, its lack of treatment) of international law.¹³⁸

There were a number of other challenges to the work of the TRC which are outlined in Volume One Chapter Seven of the Final Report. The challenge of the National Party with respect to the impartiality of the TRC was eventually settled but the strategy provided a valuable insight into the way some political actors were prepared to make use of an understanding of legality to call into question the work of the TRC. In this instance the chairperson and vice chairperson had expressed views on the testimony of De Klerk which angered the National Party.

JUDGING LAW'S COMMUNITY

Judging the Judicial Role

The democratic understanding of legality has clear implications for how the judicial role is conceived. The intention here is not to engage in a detailed assessment of political and legal conditions in South Africa. The explicit aim is to see what light Dyzenhaus's treatment of the TRC in *Judging the Judges, Judging Ourselves* casts on the issues raised in this article. The political situation and the historical debates on constitutional law, as with other societies emerging from conflict, offer a useful testing ground for fundamental questions about law. Law is the tool through which repressive policies are legitimised and implemented. The question faced by progressive social movements in such situations is whether law can be used to resist law. Are there substantive values embedded in the concept of legality or is it a purely neutral and formal concept?¹³⁹ Does the absence of a higher constitutional law mean that the judges are forced to adopt an executive-minded approach to interpretation?¹⁴⁰ It should be apparent that an adequate answer to any of these questions must rest on a secure normative basis.

The apartheid order was enforced through law and the judiciary naturally played a part in this. There is extensive literature on the role of the courts in the South African legal order. Much of this is critical of the judicial role. Forsyth, for example, is critical of the executive-mindedness of the

¹³⁸ Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" (1997) 13 *South African Journal of Human Rights* 258; Motale, "The Constitutional Court's Approach to International Law and its Method of Interpreting the 'Amnesty Decision': Intellectual Honesty or Political Expediency?" (1996) 21 *South African Yearbook of International Law* 29.

¹³⁹ For discussion see Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467.

¹⁴⁰ See Rawls *op cit*, n 40, p 237; with reference to the US Constitution he states that it "is not what the Court says that it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say what it is". But what does this mean in cases where there is no democratically mandated higher law? See *R v Secretary of State for the Home Department, ex p. Simms* [1999] 3 All ER 400, *per* Lord Hoffman p 412: "In the absence of express language or necessary implication to the contrary, the courts. . . presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

Appellate Division although he does note that the retreat from judicial control was not uniform.¹⁴¹ The important point is that in the cases examined by Forsyth the judges were not compelled to reach the conclusion they did. They chose to interpret statutes in an executive-minded way and thus bear some responsibility for the harm done. However, as a legal positivist Forsyth does not agree with Dugard (and Dyzenhaus) that it was in some sense responsible as a jurisprudential position. In fact he argues that Dugard is a legal positivist.¹⁴² The problem, he argues, is not the adoption of “vulgar austinianism” and the answer does not lie in “improvement in... jurisprudential knowledge”.¹⁴³ The argument casts doubt on the usefulness of studies such as those conducted by Dyzenhaus. The real problem, Forsyth suggests, lies in the context of judging, such as the political conditions in South Africa.¹⁴⁴ Mechanistic interpretation is only the symptom and not the cause of the problem. Others have acknowledged the problems which inhere in the task of judging the judges. Sachs’ criticism is measured and thoughtful yet penetrating.¹⁴⁵ He argues that the judges lent legitimacy to the regime though “polite and elegant language” and used their prestige to pursue injustice.¹⁴⁶ On executive-mindedness the following from the International Commission of Jurists and Bindman is relevant:

“The judges said that they saw their role as giving effect to the true intention of the legislature as expressed in statutes. The judges deny that they have any choice, and they claim that they merely do what the legislature has commanded them to do”.¹⁴⁷

The editors rejected this view noting that the judges were free to interpret with reference to common law rules of interpretation and thus with established presumptions.¹⁴⁸ While acknowledging that the executive did impose limitations they were not prepared to accept those that were self-imposed. On the vexed question of judicial resignation they stated that this was a moral question for each individual and they would express no conclusion on it.¹⁴⁹ However, where a judge decided to remain on the Bench there was no excuse for failing to exercise choices in favour of individual liberty.¹⁵⁰ Their conclusion that a “literal or positivist” approach resulted in a failure to interpret legislation in conformity with human rights standards raises many of the issues addressed above. The conclusion accords with Dyzenhaus’s assessment and can be contrasted with that of Forsyth. Responsibility rested not exclusively in the wider social context but in the mindset of the South African judiciary and their approach to legal interpretation.

It is at this point that a certain dissatisfaction might be expressed about the rather narrow focus of these scholars. Adjudication remains only one part of the bigger picture about the South African legal order. The work of

¹⁴¹ Forsyth, *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-1980* (1985).

¹⁴² *Ibid*, p 229.

¹⁴³ *Ibid*, p 230.

¹⁴⁴ *Ibid*.

¹⁴⁵ Sachs, *Justice in South Africa* (1973).

¹⁴⁶ *Ibid*, p 262.

¹⁴⁷ International Commission of Justice and Bindman (eds), *South Africa: Human Rights and the Rule of Law* (1988), pp 109-118, p 109.

¹⁴⁸ *Ibid*, p 110.

¹⁴⁹ *Ibid*, p 113.

¹⁵⁰ *Ibid*.

Dyzenhaus and others can be usefully contrasted with Abel's research on the use of law in the struggle against apartheid.¹⁵¹ Abel's focus is on how law was used in practice during the political struggle. He studiously avoids excessive abstraction and generalisation in order to highlight the particular role of law in the South African context. His gaze is directed to the political context of law rather than on adjudication. While he cautions against inflated claims about law's political usefulness in achieving social change he acknowledges that it does make a clear difference.¹⁵² One of his more interesting insights is the role of unofficial actors in triggering engagement with law. Standard accounts of legality tend to overestimate the role and importance of official actors. His affirmation of law's role in political struggle is a cautious and empirically grounded one. Law had its limitations, most notably in the fact that the government made the rules. However, in seeking authority for its actions the government resorted to legality and thus found itself ensnared within the constraints of this ideal.¹⁵³ Lobban has also sought to widen the field somewhat by examining the construction of facts and evidence at trial level.¹⁵⁴ Things can look rather different from this perspective. While the legal reasoning of the Appellate Division may be elegant, an exclusive focus on the higher courts can neglect how the other courts facilitated the state in many areas. The process of finding facts and the social and political prejudices which underpinned this are important.¹⁵⁵ Prejudice played a part in the reading of evidence with judges viewing "black youths as untrustworthy terrorists".¹⁵⁶

The Many Voices of Law's Community: The Legal Hearing of the TRC

The TRC Legal Hearing can be considered as another contribution to the established debate on the role of the legal community.¹⁵⁷ As Dugard has noted, most of the injustices committed between 1948 and 1990 were in the name of the law.¹⁵⁸ The issue which is central to Dyzenhaus's work in

¹⁵¹ Abel *op cit*, n 34

¹⁵² *Ibid*, p 523.

¹⁵³ *Ibid*, p 541.

¹⁵⁴ Lobban *op cit*, n 35.

¹⁵⁵ *Ibid*, pp 252-253.

¹⁵⁶ *Ibid*, p 257.

¹⁵⁷ See generally "The Truth and Reconciliation Commission and the Bench, Legal Practitioners and Legal Academics: Written Presentations" (1998) 115 *South African Law Journal* 15-106. Other submissions were subsequently published: see "Representation of the Association of Law Societies of the Republic of South Africa to the Truth and Reconciliation Commission" (1998) 115 *South African Law Journal* 373-378; Cameron, "Submission on the Role of the Judiciary under Apartheid" (1998) 115 *South African Law Journal* 436-438. See also Mahomed, "The Role of the Judiciary in a Constitutional State" (1998) 115 *South African Law Journal* 111; Mahomed, "The Independence of the Judiciary" (1998) 115 *South African Law Journal* 658; Corbett, "Writing a Judgment" (1998) 115 *South African Law Journal* 116; Hlophe, "The Role of Judges in a Transformed South Africa—Problems, Challenges and Prospects" (1995) 112 *South African Law Journal* 22.

¹⁵⁸ Dugard *op cit*, n 131, p 270.

this context is how law might be used against law. In order to make this argument one must possess a sufficiently robust concept of legality. It should be apparent from this article why the democratic understanding of legality is so attractive to Dyzenhaus. While he adopts a critical concept of legality his work does not highlight the purely strategic uses of law. As should be apparent from the examination of his earlier work his ambition is the construction of a democratic understanding of legality that has intrinsic, and not merely instrumental, merit. It is therefore not difficult to understand why TRC's Legal Hearing was of interest. This provided a forum for assessing the role of the legal community. One part of the mandate of the TRC, which proved to be controversial, was the special hearings for business, the churches, the judiciary, the legal and medical professions, and the media.¹⁵⁹ Dyzenhaus's work is an account of the three days of the Legal Hearing before the TRC.¹⁶⁰ However, what makes Dyzenhaus's work of more general interest is not the description of events (impressive in itself given the number of submissions and the problems of summarising the positions advanced) but the author's own thoughts on the process and its context. It is much more than a simple description of what occurred. He outlines the multiple wrongs of the apartheid regime and makes it clear that all this was known by those who did not choose to close their eyes and ears.¹⁶¹ The work of the TRC has not been without controversy. However, he accepts that the process went a long way toward opening white South Africa up to its past.¹⁶² There were, however, powerful interests in South African society uncomfortable with the idea of a truth commission.

The problems of making a reasonable assessment of the judicial role have already been mentioned. The argument most frequently heard is that judicial independence is compromised in any attempt to probe in practice (and not exclusively within legal scholarship) the role of the judges. Judges and the legal profession try to insulate themselves directly from the political process and find the concept of independence particularly useful. There are important reasons for this. Reliance on the independence of lawyers can be essential for many who wish to continue to operate during a conflict. It is, however, evident that in the South African context there was simply no way in which the legal community could be immune from the wider political context. The idea that the judicial role stands above the fray of politics is, as Dyzenhaus notes, driven by a political choice that this is the appropriate position to adopt.¹⁶³ It is a mistake to think that this political element can be avoided. Dyzenhaus turns to Nietzsche noting that not all of our past holds up to critical scrutiny and forgetting is necessary on occasions if only to allow individuals to live unshackled by it.¹⁶⁴ A

¹⁵⁹ See Guelke "Truth for Amnesty? The TRC and Human Rights Abuses in South Africa" paper presented at *Human Rights in the Twenty First Century*, Royal Irish Academy February 12, 1999. Note the following pp 14-15: "There was a reluctance on the part of many of those who gave evidence in these hearings to accept the proposition that they or the sector they were speaking on behalf of had contributed to the shoring up of apartheid through actions or inactions. Some commentators regarded the hearings as an attempt to impose collective guilt on these generally white-led and white-dominated institutions. Others saw the behaviour of the witnesses themselves as an example of the problem of non-co-operation, particularly by whites."

¹⁶⁰ *Op cit*, n 89.

¹⁶¹ *Ibid*, p 7.

¹⁶² *Ibid*, p 12.

¹⁶³ *Ibid*, p 22.

¹⁶⁴ *Ibid*, p 23.

limit is required but Dyzenhaus is rightly sceptical of those who would adopt a restrictive approach. All these issues arose during the Legal Hearing.¹⁶⁵

His criticism of law's community is damning. On legal education he notes how it failed "to make apartheid and its law part of the curriculum, and also [it] did not generally give students the critical tools for understanding their society".¹⁶⁶ At the Hearing two questions were put to those who "staffed the legal order":

"How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a way that assisted the government and the security forces?"¹⁶⁷

On the process itself Dyzenhaus charts the response of the lawyers. The first problem was that most of those who had carried out the work of making apartheid law work refused to make written submissions or attend the Hearing.¹⁶⁸ The General Council of the Bar, after some hesitation, presented a three-volume written submission and participated in the Hearing. Some of the judges displayed a resistance to the work of the TRC. Judge David Curlewis dismissed his invitation referring to it as "three pages of waffle".¹⁶⁹ Archbishop Tutu's response to this was to note that during the apartheid era the judges had made the wrong moral choices and this was yet another example of their lack of judgement. The response reflected a judicial mindset significantly out of step with the political changes in South Africa. In their absence they were often quite severely criticised during the course of the Hearing. They were roundly condemned in the oral submissions and questions were raised about their complicity in gross violations of human rights.¹⁷⁰ This element of confrontation was clearly fuelled by the impression given that the judges regarded themselves as somehow "above" the process of the TRC: an impression that is fostered by other approaches to the concept of legality.

Why does Dyzenhaus insist on focusing on the judges? Dyzenhaus's response is that the tension between law and justice is magnified in adjudication, especially in cases where the law is placed in the service of injustice. He notes the terms of the oath of office taken by members of the South African judiciary in particular. He makes use of Cover's work on anti-slavery to probe what is going on when judges opt for the plain fact approach.¹⁷¹ He believes that the oath to "administer justice" to all persons went beyond a duty to implement the interests of the powerful. On justifying this emphasis on the judges it might have been more appropriate just to acknowledge this as an interest rather than viewing it as the field where the tension between law and justice is best manifested. It could, for example, be argued that it is in the more mundane fields of law application and administration that this tension is meaningfully revealed. This would, however, involve using research tools which go beyond doctrinal analysis. This is perhaps an unfair point to raise for he clearly does not intend to take this path and his theoretical position supports his chosen method. Dyzenhaus work is centred on normative legal and political theory. The

¹⁶⁵ *Ibid*, p 25.

¹⁶⁶ *Ibid*, p 27.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid*, p 29.

¹⁶⁹ *Ibid*, p 30.

¹⁷⁰ *Ibid*, p 31.

¹⁷¹ *Ibid*, p 34.

interest of the legal and political theorist is sparked by the fact that the judges give reasons for the conclusions that they reach. Legal judgments are based on justification through reasons for substantive positions adopted. In the debates from South Africa Dyzenhaus, rightly I believe, sees familiar arguments from legal theory. The written submissions of some of the judges are of interest to those who want to understand the relationship between law and justice in this context. Dyzenhaus's view is that the connection between the two is intrinsic. In other words, law is not solely an instrument of brute force and coercion; it is also a site of interpretative struggle where resistance to power is possible. This insight is confirmed in practice in some of the written responses to the TRC.

The sections on the Hearing make for interesting reading. The submissions to the Hearing offer a rare glimpse into how the judiciary view law abstracted from everyday adjudication. Corbett, the former Chief Justice of South Africa, had a number of objections to the Hearing and the thinking underpinning it.¹⁷² Two general concerns are evident. One (the pragmatic concern) was that it was simply impracticable in the sense that all prior legal proceedings would need to be assessed in order to evaluate the judicial role properly. Here we can note that legal scholars have already undertaken some of this task. The other objection was one of principle. The Hearing would compromise the principle of judicial independence. To be sure, this was always going to be an issue but one wonders in what sense appearing before the TRC would have compromised this principle. This stance may be contrasted with his successor Chief Justice Ismail Mahomed's statement that the judges were free to appear before the TRC. Resort to a purely formal concept of independence is unacceptable if viewed within a concept of legality anchored in a culture of justification. A worthwhile process of reasoning would have to follow public discussion in which the judges were also engaged. While judges must give reasons for their decisions, and thus can be distinguished from many other public officials, it is a mistake to regard this as in itself sufficient. Although there are risks, judges should be encouraged to participate in discussion in the public sphere. Judges, as citizens working within a democratic state, must also participate in it. It is the plain fact approach (as advanced by traditional and critical scholars) which encourages us to think otherwise.

Corbett's substantive point was that the judges did not have a choice for they were required to dispense justice in accordance with the law.¹⁷³ In particular he drew the attention of the TRC to the difference between the old oath of office and the new one.¹⁷⁴ The new references to fundamental rights and the Constitution indicated that old forms of judicial deference were no longer appropriate and that the judges were now free to take a different approach.¹⁷⁵ Corbett's argument will be familiar to constitutional

¹⁷² *Ibid*, pp 37-38

¹⁷³ *Op cit*, n 157, p 18.

¹⁷⁴ *Ibid*. The old oath contained in s. 10(2)(a) of the Supreme Court Act 59 of 1959 required judges to: "...administer justice to all persons alike without fear, favour or prejudice, and... in accordance with the law and customs of the Republic of South Africa." The new oath contained in Schedule 3 of the interim Constitution required him or her to: "... uphold and protect the Constitution of the Republic and the fundamental rights entrenched therein and in doing so administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the Law of the Republic."

¹⁷⁵ *Ibid*. p 19: "Of course the position is very different today. Parliament is no longer supreme. Its laws and the laws passed by previous Parliaments can be tested against the so-called Bill of Rights contained in chapter 3 of the interim

lawyers in the United Kingdom. It is that Parliament is supreme and the courts can only do so much to remedy the flaws in this fundamental constitutional structure. Corbett suggests that the courts did make a contribution to the struggle within the set limits.¹⁷⁶ In this he is supported by the memorandum submitted by Chaskalson *et alios* on the development of the legal system in South Africa from 1964-1994.¹⁷⁷ In a section addressing resistance to apartheid and the use of law they state:

“For all the deep injustices perpetuated by law, there remained a real sense in which the techniques and procedures of law remained independent of the gross manipulation of the executive and in which justice was sometimes seen to be done. No account of these years would be accurate if it were not accepted that justice was done and seen to be done in some cases. In this way, principles and values central to the rule of law and a just legal system were not entirely lost.”¹⁷⁸

The factors in the legal system which they identified as contributing to the violation of human rights were: the absence of full democracy and the exclusion this entailed; the principle of Parliamentary sovereignty; legal positivism;¹⁷⁹ and the appointments process.¹⁸⁰ For the future they recognised the importance of law schools in the development of a “democratic legal system founded on freedom, equality and human dignity”.¹⁸¹ This submission to the TRC stands out as a thoughtful reflection on the role of the judges.¹⁸² The problems it identifies and the solutions offered speak directly to any system where Parliamentary sovereignty is the dominant constitutional concept. It confirms much of the thesis defended in this article and thus the fundamental importance of a rich concept of democratic legality.

Gaining an insight into the internal politics of the judiciary can prove difficult. The written submissions are helpful in this regard. It is evident from Dyzenhaus’s work that the internal politics of the judiciary in South Africa is divisive. There is clearly an uneasy truce between the “old and the new orders”. The argument was that there was a chance that if they had appeared before the TRC then this truce may have collapsed. An indication of the depth of the problem can be seen in the opposition to the appointment of the new Chief Justice by the “old order” in the Supreme Court of Appeal.¹⁸³ Perhaps less obvious to those with an understanding of the abuses of the apartheid regime, many of the “old order” felt there was simply nothing for them to apologise for.

Constitution and, if found wanting, be declared invalid by the Constitutional Court. And the same position will obtain under the new Constitution which will come into operation next year.”

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, p 21. The memorandum was signed by Chaskalson, Mahomed, Langa, van Heerden and Corbett.

¹⁷⁸ *Ibid.*, p 29. Cf Submission by the National Association of Democratic Lawyers, *ibid.* pp 86-100.

¹⁷⁹ *Ibid.*, p 32: “Until the late 1970s, most law schools provided students with a monotonous diet of black-letter law. What is more, the primary emphasis in most law degrees was on private law, in particular the Roman-Dutch law and its development. Without doubt these law schools produced technically competent lawyers, but their education lacked an important component.”

¹⁸⁰ *Ibid.*, pp 32-33.

¹⁸¹ *Ibid.*, p 34.

¹⁸² This contrasts with the submission of Smallberger *et al*, *ibid.*, pp 42-50.

¹⁸³ *Ibid.*, pp 39-40.

The case of Zondo is referred to on several occasions in the course of the work. He had the death penalty imposed on him by the allegedly “liberal” Judge Leon. Zondo was found guilty of planting a limpet mine which killed five civilians.¹⁸⁴ He was 19 years old when the event occurred. Leon found no extenuating circumstances, stating that his youth was not a compelling factor and that taking all matters into account they did not amount to extenuating circumstances.¹⁸⁵ Corbett’s response to Govender’s submissions in relation to this case is again revealing and confirms the general perspective outlined above. Another case noted is that of Tsafendas.¹⁸⁶ He had assassinated the Prime Minister of South Africa, Verwoerd, in 1969. At trial he was found to be unfit to plead because of an alleged mental disorder. He has since been detained “at the State President’s pleasure”. Corbett took exception to the description of Tsafendas as a “victim of apartheid” regarding the suggestion as “bizarre”.¹⁸⁷ Dyzenhaus’s account of the famous debate initiated by Wacks on the responsibility of the judiciary is instructive.¹⁸⁸ The option that Wacks suggested was judicial resignation, an offer that was refused by the judges and criticised by some scholars. It is of interest that the submission by Chaskalson *et alios*, which is acknowledged by Dyzenhaus to be impressive, avoided the issue which this debate raised that is, whether lawyers should have accepted appointment to the Bench during apartheid. One particularly amusing comment in the submission, noted by Dyzenhaus, is that if they had refused appointment the Bench would have ended up being staffed with “political puppets”.¹⁸⁹ This begs the question. Although it is relatively easy to be critical it is clear from the submissions that particularly acute moral problems did arise for the “liberal” judges especially following Wacks public call for them to resign.¹⁹⁰ In response to this call Dugard noted that in “his haste to transplant Dworkin’s views in the South African judicial process, he has overlooked the very nature of the South African legal system”.¹⁹¹ Dugard emphasised the role of common-law principles and the argument that the judges could allow themselves to be guided by these principles. Room for judicial creativity had simply not been blocked.¹⁹² Dugard argued that the judges should not resign because they had a clear role in the development of the common law and thus with using the room that existed to protect human rights.¹⁹³

Of course some members of the judiciary were not particularly bothered by these ethical objections. Some displayed worrying signs of anti-intellectualism and berated academics for their critical comments. Dyzenhaus cites the example of Thompson who in *S v Van Niekerk*¹⁹⁴ effectively engaged in the punishment of an academic “for drawing [his]

¹⁸⁴ *Ibid*, p 41.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Ibid*, pp 43-44.

¹⁸⁷ *Ibid*, p 44.

¹⁸⁸ *Ibid*, p 56-57

¹⁸⁹ *Ibid*, p 58.

¹⁹⁰ Wacks, “Judges and Injustice” (1984) 101 *South African Law Journal* 266. It is clear from the written submissions to the TRC that members of the judiciary were troubled by this particular problem. See, for example, Submission by Justice Richard J Goldstone *op cit*, n 157, pp 55-56.

¹⁹¹ Dugard, “Should Judges Resign—A Reply to Professor Wacks” (1984) 101 *South African Law Journal* 286.

¹⁹² *Ibid*, p 291.

¹⁹³ For the response see Wacks, “Judging Judges: A Brief Rejoinder to Professor Dugard” (1984) 101 *South African Law Journal* 295.

¹⁹⁴ (1972) 3 SA 711 (A).

attention to a conception of the rule of law to which [he was] arguably beholden".¹⁹⁵

It is important at this point to stress what Dyzenhaus's narrative is not. It is not a full-frontal assault on the judiciary and the legal profession for their inadequacies and failures based on the view that it is "all about power anyway". It is a critique which rests on an expansive understanding of the rule of law. Thus he recognises that judges do need to be free from political influence and independent if the job is to be done properly. In the South African context the concept of independence was, however, so empty as to be meaningless and did little to challenge the resort to a plain fact approach. The failure of members of the judiciary to present themselves before the Legal Hearing excluded the possibility of a meaningful dialogue about what judicial independence really means under such conditions. In this sense the refusal is peculiarly anti-modern in that the judges were not prepared to offer a rational justification for their past actions. In modern constitutional democracies this ability to be able to justify through reasons is central to the existence of legitimate public authority. Such aristocratic disdain for democracy is not confined to the South African context. A point often forgotten is that the judges, unlike numerous members of the security forces, had access to all the reasoned arguments as well as exposure to a wealth of scholarly writing:

"[People] needed to know how men in so privileged a position, with such an important role, and with so much space to do other than they did, made the wrong moral choice. . .".¹⁹⁶

Dyzenhaus adopts Adorno's famous phrase on managing public memory as a motif. It is not an unconscious process, it is a decision made by those who do remember.¹⁹⁷ Much of what follows is a detailed analysis of how the various members of the legal community attempted to carry out this exercise. The exploration of the role of particular individuals is difficult to evaluate from an "outsider's perspective". What is evident is that the internal politics of the legal profession had significant practical implications. The submission of the General Council of the Bar was one made in the face of considerable internal opposition.¹⁹⁸ It included an apology from the Pretoria Bar Council which had been notable for its failure to join others in their condemnation of apartheid. The oral submission revealed, yet again, worrying levels of anti-intellectualism within the Bar and an unwillingness to engage with the questions of the TRC.¹⁹⁹ Dyzenhaus is right to note how the culture of the Bar contributed to a misguided sense of superiority. Too much faith was placed during the submissions on unreflective views of the importance of an independent Bar of advocates. As with the judges a dialogue on the meaning of independence is avoided:

"But the great majority of men at the Bar said "yes" to apartheid, proving themselves content to support and reap the benefits of South African society which, to adapt a phrase from an influential feminist thinker, was designed as an affirmative action plan for white men."²⁰⁰

¹⁹⁵ *Op cit*, n 117, p 72.

¹⁹⁶ *Ibid*, p 90.

¹⁹⁷ *Ibid*, p 92.

¹⁹⁸ *Ibid*, pp 67-86.

¹⁹⁹ *Ibid*, p 102.

²⁰⁰ *Ibid*, p 110.

What about the teachers?²⁰¹ As the group responsible for teaching the future members of law's community it was entirely appropriate that they were asked to participate. The problem revealed is a failure, prior to the 1980s, of academics to engage in criticism of apartheid. A damaging deference to authority was nurtured and pervaded areas of legal education. Dyzenhaus is unsparing in his criticism of South African academics who failed "to take up [the] role of critics of the law and of the legal institutions of their society".²⁰² Dyzenhaus's work is testament to the many who made the wrong moral choices and who, for a variety of reasons, should have known better. If there is a lesson from this section it is that legal education needs to instill a sense of critical awareness in its students and to ensure that they do not defer to unjustified and illegitimate authority.

The final chapter on the politics of the rule of law is the most satisfying. It is here that Dyzenhaus has the space to evaluate some of the central claims used to justify the inadequate responses to injustice. The claim of independence is one most often cited, yet seldom explored in any depth. One of the welcome results of the judges' unwillingness to come before the TRC was that it sparked a public debate on judicial accountability. He clearly believes that the bare assertion of independence is not enough, we have to ask what independence is for:

"A democratic society needs independent judges for the same reasons it needs independent lawyers. Their independence provides the potential to bring the government – the state in practice – into line when it oppresses the people whose interests it is meant to serve. In fulfilling that potential, judges and lawyers play a crucial role in ensuring the democratic accountability of state institutions."²⁰³

The reasoning which Dyzenhaus adopts to defend his position is persuasive and, as indicated elsewhere in this article, has been constructed after considerable scholarly reflection. This again is best viewed as part of a contemporary school of thought which is critical of some of the more exotic trends in critical legal scholarship. In other words, it is a concept of legality for those who have not given up on constructive critical engagement with law's community. The legal community has nothing to fear from the concept of independence he advances if it is committed to the rule of law, human rights and democratic governance. If judges become complicit in state oppression then it is no use seeking refuge in an empty and purely formal concept of independence. Again one cannot fully understand Dyzenhaus's position without grasping the concept of legality with which he is working. At its core this is an understanding of legality which sets limits on Parliamentary sovereignty. The majority of judges simply refused to confront the state with the constraints of legality. In this there was a dereliction of duty and the judges failed to give voice to a "constitutional vision" of legality.²⁰⁴ As he stresses, however, it would be naïve to overestimate the judicial role in this context or the tragic moral choices that had to be made. And it is on this issue that his work might attract criticism. Is it the case that Dyzenhaus places too much store by what judges can and cannot do even under an expansive understanding of legality? Whatever view is taken of the role of the judges in a democratic legal order they exist in an institutional context which demands some form

²⁰¹ See Submission by the Society of University Teachers of Law and Certain Law Schools *op cit*, n 157, pp 101-106.

²⁰² *Op cit*, n 117, p 119.

²⁰³ *Ibid*, p 146

²⁰⁴ *Ibid*, p 160.

of justification. This justification rests on an understanding of legality which can remain submerged but can always be reconstructed from substantive commitments and positions. Critics of Dyzenhaus's understanding must meet it with a competing understanding of legality which can account for the social practice in a convincing way.²⁰⁵ As I argue in this article the concept of legality which emerges in his work is an attractive one. The focus on adjudication may be narrow and partial but as long as the judicial role continues it will require a paradigmatic understanding through which to orientate judicial practice. The democratic understanding defended in the writings of scholars mentioned in this article is I suggest a persuasive one. As Dyzenhaus notes, the failure of the judges to appear before the Hearing demonstrated that they still did not conceive of themselves as citizens within a democracy.²⁰⁶ This was a perfect opportunity which was missed for the judges to engage in a public discussion of the legitimacy of their work in the new South Africa.

Since *Judging the Judges, Judging Ourselves* was completed the TRC has issued its Final Report. Its findings on the Legal Hearing are contained in Volume Four Chapter Four. The TRC expressed its disappointment that judicial officers (both judges and magistrates) declined to attend. The Chapter describes the argument of the establishment bodies and the counterargument, much of which has been examined above. The TRC outlined the assumptions upon which its findings were based and which "enjoy relatively widespread acceptance".²⁰⁷ These may be summarised as follows: (1) judges had a choice in almost all circumstances; (2) the values inculcated by communal culture and the culture of the Bench and the Bar are important; (3) where no choice existed other steps were open to the judiciary; (4) the appointment process and execution of court decisions raised questions about independence; (5) there needs to be substance to the concept of independence and the space which it opens must be used to "preserve basic equity and decency in a legal system";²⁰⁸ (6) the appearance of judicial independence and adherence to legalism can legitimise an unjust government; (7) and "[n]o one who participates in an evil system can be entirely free of responsibility for some injustice".²⁰⁹ It concluded this section with the following:

"Law and justice are by no means co-extensive although, at a fundamental level, their interests and constituent elements are likely to coincide. [An] uncritical acceptance of promulgated rules of law is unlikely to contribute to the achievement of justice in any more than the formal sense."²¹⁰

As it stressed, the purpose of this part of the Report was not to attribute guilt but to draw on the lessons of the past for the purpose of transforming the legal process in the future. As to the findings the Report noted that the National Party craved the legitimacy which the concept of legality brought with it. In the 1980s however even this adherence to a purely formal

²⁰⁵ See, for example, Ewick and Silbey, *The Common Place of Law: Studies From Everyday Life* (1998), p 23: "we conceive of legality as an emergent structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings. *Legality operates, then, as both an interpretative framework and a set of resources with which and through which the social world (including that part known as the law) is constituted* (my emphasis)."

²⁰⁶ *Op cit*, n 117, p 171.

²⁰⁷ Para 22.

²⁰⁸ Para 27.

²⁰⁹ Para 29.

²¹⁰ Para 30.

concept of legality was abandoned.²¹¹ A list of examples is provided to demonstrate that the courts and the legal profession “generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice”.²¹² For all this the TRC recognised that a few lawyers (judges, teachers and students) were prepared to break with the norm. This group worked ceaselessly in this effort and the TRC acknowledged the courage, strength and perseverance which this demanded. On the persistent references to the Westminster model as justification for submissive deference, the TRC found this to be a flawed argument, even referring to Dicey to defend its position.²¹³ The further argument about independence was again not accepted as convincing by the TRC. Although unreservedly accepting the importance of the principle of independence the TRC expressed its deep disappointment. It could not see how an appearance before the TRC could compromise independence. This was a unique event that was unlikely to create any kind of precedent:

“The Commission was thus denied the opportunity to engage in debate with judges as to how the administration of justice could adapt to fulfil the tasks demanded of it in the new legal system; not so as to dictate or bind them in the future, but so as to underline the need urgently to re-evaluate the nature of the judiciary. In some ways, it seems that the judicial non-appearance indicated a reluctance to consider alternatives to the conventions of the past, many of which might be conducive to justice, but which would clearly hinder the attainment of the type of society envisaged by the Constitution”.²¹⁴

It is evident from the Findings that the TRC was irritated by the judiciary’s refusal to engage with it and it is arguable that history will judge them harshly. The section of the Report makes for dispiriting reading for those who wish to see judicial recognition of their responsibilities to citizens within a constitutional democracy and who view accountability as internally connected to a substantive understanding of independence. This is not true, however, of all the submissions. Some provide evidence of a high level of careful thought by members of the judiciary about their role in the new South Africa. These submissions are encouraging and lessons can be drawn from the thinking that is contained in them.

CONCLUSION

Any assessment of the role of the legal community has a normative basis. In other words, all legal scholars function with an understanding of legality. This is either explicitly defended in their work or is implied in their argument or method. Too often, in the United Kingdom at least, thinking on constitutional law is blighted by a partial frame of conceptual reference which then distorts reflection on constitutionalism in practice. This is apparent in the current debates on constitutional restructuring. In this article I defend a democratic understanding of legality based on a reading of the work of Dyzenhaus among others. There is much humbug talked about legality. While reflection on its normative basis, and its general qualities, is essential, it is important that context informs the analysis. To think critically about legality is to reflect on the ways it can

²¹¹ Para 32.

²¹² Paras 33-34.

²¹³ Para 41.

²¹⁴ Para 44.

be used by participants in law's community to uphold important democratic and other values. Social movements, for example, will wish to know how legality can be used to advance political goals. This assessment will have much to do with strategy and tactics and how the rhetoric of law can be used to get results. The concept of legality examined in this article has a value which goes beyond the instrumental. Although legal discourse involves contestation this does not mean that participants should not expect the institution of law to deliver reasoned results. The argumentative model of legality focuses primarily on justification through the provision of reasons that are aimed at persuading all participants. By advancing a model founded upon argumentation and a culture of justification there is room to view legality not as a closed book but as a *continuing conversation*. To those who regard this level of contestation and argument as troubling I would suggest that they instead focus on those who seek final closure of the debate.²¹⁵ What citizens can expect from this concept of legality is reasoned justification for determinate outcomes in particular cases. This is, however, only a contingent interpretation that is open to re-negotiation. This pragmatic concept of legality also supplies the tools of critique. Far from encouraging apathy and quietism a dynamic concept of legality might encourage political and legal engagement: for a purely formal concept of legality misses the point. The reason for my emphasis on a relational understanding is to ensure that the people who make change happen are not left out of the equation. For legality to fulfil a useful function (as well as its intrinsic conceptual merit) it must be used in argumentation by institutional actors, social movements and individuals. As this article has tried to indicate, it is in political struggles where law is under stress that legal theory can ground useful insights into the nature of legality. This anti-positivist concept of legality encourages us to view formal enactment of law as a beginning and not an end to the argument. The progressive belief which underpins this is that law can constrain arbitrary power and thus can be a tool in the struggle for social justice and against the neo-liberal free market hegemony. It is a concept of legality without illusions that restores a dynamic concept of law to its place in encouraging argumentation within a revived public sphere.

Many of these issues arise in transitional societies. The South African TRC and its assessment of the legal community is intrinsically interesting but is particularly valuable for the light it sheds on the debates explored here. What is fascinating about this is that, as Dyzenhaus states, the "legal order was put on trial—law found itself before a tribunal".²¹⁶ The purpose of this was not to pour scorn but "to engage the most important legal actors in both the old and new orders in a constructive debate, one which would resonate outside the Hearing...".²¹⁷ As he notes:

"Law. . . can make a difference, even under the very unpromising conditions of apartheid South Africa, and this goes a long way to show that legal order or legality places constraints on the powerful which at bottom are political and moral constraints—the constraints of commitment to a community of free and equal citizens."

It is difficult to avoid drawing comparisons even if events must be considered in their highly specific contexts.²¹⁸ It is clear that much can be

²¹⁵ Cf Connolly, *The Terms of Political Discourse* (3rd ed. 1993) p 213.

²¹⁶ *Op cit*, n 117, p 182.

²¹⁷ *Op cit*, n 117, p 182.

²¹⁸ On the role of the courts in the Northern Ireland context see S. Livingstone, "The House of Lords and the Northern Ireland Conflict" (1994) 57 *Modern Law Review* 333.

learned from the South African experience. The examination of these issues in the Northern Ireland context is for another day.²¹⁹ Nevertheless, it will be interesting to see whether a public debate emerges on the role of the judiciary and the legal profession. Will the judicial role undergo the same transformation as is taking place in other areas of society? If it does not, to what extent can the judiciary be said to have faced up to their responsibilities as citizens within a democratic polity? If the proposed constitutional reforms become a reality, then many aspects of the settlement and its meaning may find their way into the courts. Are we satisfied that the courts in Northern Ireland have adjusted adequately to the changing constitutional context? If not, what is to be done?

²¹⁹ See Hamber (ed), *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition* (1998); Bloomfield, *We Will Remember Them: Report of the Northern Ireland Victims Commissioner* (1998). See also Fay, Morrissey and Smyth, *Northern Ireland's Troubles: The Human Cost* (1999).