

## Conversations with Professor David Dyzenhaus

by

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*This is the eighth interview for the Eminent Scholars Archive with an incumbent of the Arthur Goodhart Visiting Professor of Legal Science.*

*Professor David Dyzenhaus is the Professor of Philosophy and Law at the University of Toronto.*

*This interview was recorded, and the audio version is available on this website.*

*Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.*

Interviewer: Lesley Dingle, her questions are **in bold type**.

Professor Dyzenhaus' answers are in normal type.

Comments added by LD, [*in italics*]. Footnotes added by LD.

**1. Professor Dyzenhaus, you are the eighth Goodhart Professor that I have the pleasure of interviewing and I am very grateful to you for kindly agreeing to add to our archive. I hope that in this interview we can talk about your career, your early life and then hopefully touch on some aspects of your scholarly work.**

**You were born in 1955 in Johannesburg and I wonder if you can tell us something about your early life in the late fifties and sixties?**

Right. So just one correction. I was born in '57.

**2. 1957, thank you.**

57, yes. I was born in Johannesburg and grew up in South Africa during the apartheid era. I had a kind of ordinary middle-class life growing up in South Africa. I was made aware fairly early on that there was something rather strange about the society, because my mother was a political activist. She was engaged all her adult life in various liberal causes and so I spent part of my early life working for an opposition party which was then called, I think, the Progressive Party and my mother was an active member of an organisation called the Black Sash<sup>3</sup> and I took part from an early age in their protests and other activities. So I did have some sense growing up, which was rather different from most of the people I knew, that there was something fundamentally wrong with South African society, but that sense somehow was uneasily matched by a sense that everything was okay and for the most part I just lived my life as a middle-class kid.

**3. Your mother was politically active. Was your father - was he a lawyer?**

No, my father was a refugee who had happened to land up in South Africa which was not the place he wanted to be. He was born in Poland. He is Jewish, as was my mother and of course as I am, and he managed to survive the war in Poland and went to university in Paris then tried to stay in London. The English didn't want him to stay because it was very difficult to get permission to stay at that time and somehow he ended up in South Africa. And he wasn't politically active at all but he did have, because of his own experiences, a kind of visceral hatred of all kinds of nationalism and so he had no time at all for the apartheid

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<sup>3</sup> South African, non-violent, white women's resistance organization founded in 1955 by Jean Sinclair.



government because he saw it as in some ways not all that different from the oppressive regime under which he had suffered. And so that also gave me a perspective about the place of whites in South Africa which was rather different from most of my fellows.

**4. You mentioned in the preface to one of your books your grandfather Ludwik. He had actually been shot during the occupation in Poland by Germans... well, not necessarily by Germans but he had been....**

Yes, he was shot by the Germans. So early in the war he was taken hostage along with around 20 other prominent Jews because a Jew who had been found with a radio and imprisoned had managed to escape his imprisonment, so the Germans took these prominent Jews and said if the fellow didn't give himself up then they would shoot the people they had taken. Of course, he didn't give himself up and so they shot the people they had taken.

**5. Do you know how old he was at that time?**

I'm very bad at dates, so I think he probably would have been in his early forties, mid-forties.

**6. Coming back to your early life growing up in South Africa, were there many events that were very traumatic and very dramatic politically. Did any of these affect you particularly as a child, as a young boy perhaps?**

I think that I became fully aware of what was going on quite late in my time at high school and then even more when I became a student at the University of the Witwatersrand in the seventies. So before then I was aware of things, but they didn't really have much impact on my life except insofar as I was pulled into my mother's various activities.

**7. The high school that you went to, which school was that?**

Well, I went to an unusual high school. So the school I went to was started the year that I began high school by someone who had been fired by the board of one of South Africa's private schools. As I am sure you will know, there is a system of private schools in South Africa which are kind of modelled on the English public school and he had become headmaster of one of these schools and his views were considered too liberal by the board of governors so they fired him, so he decided to start his own very liberal school. And in the first year there were maybe 40 students over four years and they were nearly all there because they had liberal parents who wanted their children to grow up educated in a way that wasn't dictated by the apartheid system. So it was a school where we were for the most part taught to question things and not to accept something just because someone who claimed authority said that it was so, and that I think was when I first started to grow up properly politically.

**8. Do you have recollections of any particular teachers?**

I had a couple of English teachers who really made a huge difference to me. So the first was a teacher who had come with the headmaster from the private school to the new school that the headmaster founded and it was actually largely because of this teacher that the headmaster had been fired. He had written a play together with his students which had allusions to sexuality and some parents got wind of this, objected and the board demanded that the headmaster fire this teacher, whose name was Brindley, and the headmaster refused and that's why he was fired. So he brought this teacher with him to the school which was called Woodmead. It was just outside of Johannesburg. And he actually didn't spend much time teaching us English, he spent most of his time arguing with us and trying to shake up our prejudices and preconceptions. Ironically, he himself resigned at a certain point, because he



wrote a play together with my class which was very atheistic in tone and the headmaster, a man called Krige, although he was a white political radical by the kind of common lights of the time in South Africa, was a deeply religious man. He was, and this was not uncommon in South Africa, a deeply devout Christian with radical political views and he did not like the kind of unrelenting atheistic line in this play and he insisted that Brindley and the class who was writing the play with him take a more balanced approach and Brindley refused and resigned and that was the end of Brindley. Which was not a good thing, but the one benefit of it was that he was replaced by another wonderful English teacher who actually taught us some English but in a very innovative way and she was the best teacher I encountered during this time.

### **9. What was her name?**

Her name was, probably still is Miranda Alcock. I think she has lived in England for a long time,

### **10. When you went to university did you do English as a first degree? You did a BA, and in 1977 you graduated.**

English was my main love, but I disliked the English Department as I discovered at the University of the Witwatersrand so intensely that I dropped English after the first year. They seemed to me to think that they were some kind of outpost of Oxbridge in South Africa and with a few kind of token exceptions, all we studied was kind of English literature conventionally understood and I just didn't like it and I switched my major to political science which I really liked. The Political Science Department was one of the best teaching departments I have encountered anywhere.

### **11. Any particular lecturers that stand out?**

Well, the two main influences on me were a South African called Michael Nupen and an American called Sheldon Leader<sup>4</sup> and they... it was a strange feature of politics departments at the English speaking universities in South Africa that they were dominated by Marxists and somehow the government, repressive as it was, thought that academic Marxism was beneath its modus. So the big conflict in the department was between one school of Marxism with the Hegelian Frankfurt School led by Nupen and another which was the French Structuralist school led by Leader, and this conflict played itself out throughout my undergraduate education and it actually seemed to have real relevance to what was happening in South Africa. So this is really what excited me about being taught political theory the way that I was, is that even though we were reading very abstract texts for the most part, that it actually seemed to explain things as they were happening.

### **12. And the seeds began to germinate for your later scholarly work perhaps through this initial exposure?**

Well, in South Africa, or at least at my university at that time, the main law degree was a second degree as it is in North America, even though it was called an LLB. And the second degree took three years but one could shave a year off by doing various law courses in one's undergraduate degree. So my two majors, that is the subjects I specialised in, were law and political science and because the Political Science Department was mostly a political theory department, in my three years of my undergraduate degree I had this consistent

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<sup>4</sup> Professor Sheldon Leader, BA (Yale), MA, DPhil (Oxford), Barrister, Director, Essex Business and Human Rights Project, University of Essex.



combination of law and political theory. When I went to law school after I had finished my undergraduate degree what I really was interested in was the intersection of legal issues and political theory and that's really where I have been working ever since.

**13. During your LLB, were there any particular lecturers that stand out?**

Well, the one... the lecturer who had by far the biggest influence on me is someone who I think is one of my predecessors, a Goodhart Professor. Was John Dugard<sup>5</sup> a Goodhart Professor?

**14. He was.**

Yes. So John Dugard really transformed my legal interests. As you will know, his international reputation is justly earned as an international lawyer.

**15. Yes.**

And the international law course he taught was wonderful because a significant component in that course was the dispute over Namibia and South West Africa and we learnt the kind of intricacies of this international law problem in a way that seemed to me to illuminate both what was happening more generally in international law but also what was happening on the ground in southern Africa. But because John thought that legal theory was really important for understanding the apartheid state he took it upon himself, even though this wasn't his specialty, to teach jurisprudence. So again, we learnt jurisprudence in a way that made issues, very abstract issues in legal theory, seem directly relevant to what was happening in the practice of law.

**16. Very interesting. So you graduated as an LLB in, was it...?**

'79 I think.

**17. The years from 1980 to '82, I'm not actually sure about...I know you became a lecturer in 1982, but in those intervening years did you do articles?**

No, what I did was my army service.

Yes. I made the mistake, and my mother was terribly upset with me about this, of not going to the army straight after school. So the choice as I saw it was that if you wanted to stay in South Africa, as I did, then you had to go to the army.

There was another option which was that you could do double the time of your army service in a military prison, and a military prison in South Africa was no picnic. So if I had gone straight after school I would have gone for just a year but during the time that I was at university they changed the compulsory service to two years, so I spent two years in the South African Defence Force.

**18. Whereabouts were you posted?**

Well, initially, because I was both physically fit and a graduate I was sent to an officer training school just outside of Pretoria. So I was put on an officers' course there and I was destined to be a law officer which was a pretty privileged way of being in the South African army. I would have likely been posted to Pretoria afterwards but I was thrown off the course at the end as a security risk and at that point I was sent to a unit just outside of Johannesburg

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<sup>5</sup> Christopher John Robert Dugard, (b. 1936-), South African professor of international law, specialising in Roman-Dutch law, public international law, jurisprudence, human rights, criminal procedure and international criminal law. He has served on the International Law Commission. Currently Emeritus professor at University of Leiden.



where I spent some 14 months as a postal clerk.

**19. Perhaps in a sense that was the beginning of your political engagement.... in that your national service could have been a lot easier?**

Well, my political engagement began in...well while I was an undergraduate I was an active person in student politics. I held office in the National Union of South African Students' local chapter at the university and I took part in that kind of student activity, took part in student protests. So I was, as it were, fully politicised before I went into the army, which didn't make being in the army any easier and I think largely because of the people I was friendly with at university, most of whom were much more radical than I was, some of them were already involved in African National Congress underground activities, the army was keeping a watch on me, then they started opening my post and they used the pretext of a letter I had sent to a friend in England as to throw me off the officers' course.

**20. Very interesting. So you then became a lecturer in 1982 at Wits. You were a full-time lecturer for at least a year. Was this a happy time, an interesting time in your career, at the beginning of your academic career?**

It was actually a great time. John Dugard had just started the Centre for Applied Legal Studies, which still exists today and does an interesting mix of academic work and practice, and he had brought people to the centre who were pioneers as it turned out in South African labour law, in human rights law and there were also several people who had been recruited to the faculty who were only a couple of years older than I was but who were deeply interested in the same sorts of issues. So in a way it was one of the most intellectually exciting times of my life.

**21. You didn't stay there for very long, and this was presumably because you went to Oxford to start your PhD. I wonder if you could describe the circumstances of this very important change in your life?**

I could have proceeded lecturing at the University of the Witwatersrand and in fact that's what I wanted to do with my life but, because I was interested in legal theory and because legal theory was not a thriving concern in South Africa, I soon realised my limitations and also that it wasn't the case that there were all that many people around that I could learn a lot from. So as I mentioned, John Dugard had taught jurisprudence, not because it was something he specialised in but because he thought it was important that someone like him teach it. The people who were engaged in legal theory were a bit like, for the most, the English Department at the University of the Witwatersrand, they were uninterested in the legal issues of apartheid, and I thought that I needed to do graduate work, which I couldn't do in South Africa, in order to continue as a South African legal theorist. So I had to resign my position because I wanted to go to England to do a doctorate and there was no way that the university was going to give me three years off. But their understanding and my understanding was that as soon as I had finished this doctorate I would go back to South Africa, but I was diverted by falling in love with a fellow graduate student who is Canadian.

**22. In Oxford?**

In Oxford. And at the point where we decided that we should get married we decided that we should do that without letting the issue of which country we were going to live in cloud our decision. So we got married and then we started thinking about where we should live as we got to the end of our doctorates. Although my wife, who is a philosopher, was fully prepared to try life in South Africa I was actually by that point very reluctant to let her



attempt life in South Africa because this was in 1987 that we were thinking about where to go and there had been one state of emergency after another in South Africa and it wasn't clear when this process was going to end. It actually seemed that things would just get worse. And I remember going – and this was actually a kind of turning point for me – going to a talk by a senior figure in African National Congress in Oxford, who was then a minister in the first cabinet after the transition and he, at this point, it was 87, said that there was no cause for optimism in South Africa. He just could see things getting worse. And so we did decide to go to Canada.

**23. I wondered about that - whether you felt that you just would not be able to function properly in South Africa or whether perhaps you had met your wife at that point?**

I thought that I would function fine but philosophy was in a terrible state in South Africa.

I didn't do philosophy at university because the Philosophy Department was much like the English Department and it really just wasn't a good academic place for her in the South African Philosophy Academy at that point, besides the fact that she found South Africa appalling in a way that I didn't. So despite the fact that I think I was pretty clear-headed about how bad things were, she could just not take the thought of having a black person as a servant. And I used to say to her, "If we go to South Africa and we set up home somewhere and people get wind of the fact that we are not employing a black person as a servant we will have a line up a few blocks long of people begging for work" and she just couldn't take that kind of thought.

**24. So you decided to move to Canada rather than stay in England. Did you feel that perhaps England was too small, perhaps too claustrophobic?**

She actually would have been happy to stay in England but for some reason, and I can't quite recollect whether I had a good reason or not or quite what it was, I thought that it would be better to go to Canada.

**25. And so you went to Queen's University where you had an adjunct and assistant professorships, but before we come to that, I'm sorry, I just want to touch on this, you had some part-time lectureships while you were at Oxford, at UCL and Queen Mary College. Did you do those to help fund your PhD?**

No, not really, I had funding for the PhD so that wasn't a problem. One thing I omitted was that my first year as a graduate student in England wasn't in Oxford it was at UCL. But that didn't work out for various reasons and I transferred to Oxford. But William Twining<sup>6</sup>, who was a Quain Professor of Jurisprudence at UCL, got me to teach there, I think during my year in London and then I taught there subsequently and because of that when there was a vacancy for a part-time person at Queen Mary they asked me to fill that spot and I did it mostly because I enjoyed the teaching. I missed my teaching as a graduate student and although the extra money was very welcome it wasn't primarily for the money that I did it.

**26. So what did you teach?**

I taught legal theory.

**27. Legal theory. And you commuted from Oxford?**

Yes. I found actually it was a very nice break from having to steel myself to do my

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<sup>6</sup> William Twining, Emeritus Quain Professor of Jurisprudence at University College London (till 1996).



own work.

**28. The one informing the other?**

Yes.

**29. So then you moved after your PhD to Queen's University at Kingston and after that you were given an assistant professorship of law and philosophy at the University of Toronto. So before we look at that, at Kingston were you a lawyer or were you a philosopher?**

It was something more complicated than that. So the Philosophy Department recruited my wife into a full-time position straight out of her PhD and so the question arose what to do with this person who now gets called the "trailing spouse" – it was called something less flattering in the past – and Queen's put in a one-year contract for me but because they didn't really know what to make of me they actually shared me out between law, philosophy and sociology, so I had three academic homes in my first year there.

**30. And you taught?**

I taught in law, I taught a course on the rule of law. In sociology I taught a course on the social theory of Max Weber<sup>7</sup>, someone I have always been interested in. And in philosophy, I think I taught a kind of straight legal theory course.

**31. So when you moved to Toronto and you had this assistant professorship of both law and philosophy, it was at this point that you began to make steady progression up the academic ladder and you used this time to write up your PhD in what became your first book, which was the "Hard Cases in Wicked Legal Systems."<sup>8</sup> And I wondered if you could summarise for us in a nutshell what your main conclusions were and the circumstances of writing up this important work?**

So from the time that I was starting to learn a little bit about the law, what puzzled me about South African law was that despite the fact that a highly oppressive government had been in power for a long time, was completely unembarrassed for the most part about the way that it used laws and instruments of its racist policies and had complete control over parliament. Despite all of that somehow law did provide some kind of resource for resisting apartheid law. So it was possible throughout apartheid, even during the worst days, to bring legal challenges against the manner in which apartheid law was being implemented. So it was also the case – there is an important detail that I left out – there was no written constitution with an entrenchment of rights that could be used as a resource. So all they could use was really the resources that are familiar to lawyers in the common law tradition and the ability to continue to exploit these resources even at the worst times fascinated me. And when I went to England what I wanted to work on was whether one could make legal philosophical sense of the persistence of these resources in the face of a government that seemed all-powerful and was doing its best to get rid of these resources. And so what I concluded is that these resources, which I suppose one could say are resources that conduce to the protection of the liberty and equality of all those who are subject to the law, that these resources are in a way necessary components of any legal order and to the extent that a government succeeds in getting rid of these resources, it actually moves to a different mode of government that is a mode of government different from governing according to law.

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<sup>7</sup> Karl Emil Maximilian "Max" Weber, (1864-1920), German sociologist, philosopher, and political economist.

<sup>8</sup> *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).



**32. So do you feel that having grown up in South Africa and experienced much of what you describe at first-hand account gave you more insight than, for example, somebody who would have been writing about these matters at remove?**

Well, yes, I think the answer is that I did think and do think that if you grow up in a place like South Africa you do have a different sense of the impact of issues, such as the issues I was working on, on what happens in people's lives.

**33. In looking back over the last 20 years since apartheid was dismantled and some of the worst excesses have been removed, do you feel happy with the way things have gone?**

Well, I still have family and very good friends in South Africa and I have noticed over the years that – and this might be true of other South Africans who have lived abroad – that I tend to be much more optimistic about South Africa than my family and friends are. That is, I still think that it's a rather large miracle that this transition happened at all and, despite all the really glaring flaws of an ANC government, particularly in the last few years, it still seems to me to be a place which has a future and it's certainly a lot better than the past.

**34. Yes. Your thesis that positivism is destructive of the health of legal practice is based on a common law jurisdiction, in fact a mixed system, and I wondered whether you had looked at any other systems to see if this is a general rule. For example, USSR or Sharia law?**

Well, the only other legal order I have studied in some detail, which is the topic of my second book, is the legal order of Weimar. So I was always interested in German social and political theory, an interest that came out of my education in the Political Science Department at the University of Witwatersrand. And one of the most important exchanges in legal theory in the 20<sup>th</sup> century, between the great legal positivist HLA Hart<sup>9</sup> and Lon L Fuller<sup>10</sup> in 1958, one of the topics they focused on was the legal experience of Germans under Nazism. So I had always had a desire to find out more about these issues than one could learn from just this brief exchange between Hart and Fuller and so I put quite a lot of effort into making it possible for me to go to Germany for a year in order to do research into Weimar legal theory which I knew almost nothing about, other than I thought it would be interesting.

**35. And this was I think in 1992 when you were a Humboldt Fellow?**

Yes, I was awarded a Humboldt fellowship in... I was in Germany from I think probably August of '92 until July of '93.

**36. And you were able presumably to gather data during this time for your book<sup>11</sup>?**

Well, what I read was a lot of German constitutional and political theory and learnt about some of the legal issues that arose, especially in late Weimar as the Weimar political and legal order was disintegrating, and the book explores, as did my first book, the issue when there are implications for political and theory from what happens in actual practice.

**37. I obviously had to depend on reviews to get some sense of your work, of your**

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<sup>9</sup> Herbert Lionel Adolphus Hart, (1907-92), Professor of Jurisprudence, Oxford University (1952-69).

<sup>10</sup> Lon Luvois Fuller (1902-1978), Professor of Law, Harvard.

<sup>11</sup> *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997).





**scholarly work and I looked at a review by Professor Julian Rivers<sup>12</sup> from Bristol and one of the interesting points I thought that he made was that when the new German constitution was created after the Second World War, in his opinion it was more influenced by the legal philosopher Smend<sup>13</sup> than of the three philosophers that you analysed. Do you think this is a fair point?**

It might be a fair point. Julian Rivers is an excellent scholar and he knows a lot about German constitutional developments after the war. I am not really in a position to question his judgement on that point. It does seem to me that others argue that Kelsen<sup>14</sup> was a significant influence, perhaps more significant than Smend. Kelsen was not only a great legal theorist, some people think there is justification for this thought that perhaps he is the greatest legal theorist ever, but he was not only a legal theorist, he was also a very prominent international lawyer. But in the 1920s in Austria he played a significant role in designing the first constitutional court in Europe and actually sat as a judge on that constitutional court. His understanding of a specialised constitutional court I think was very important in the German deliberations about what kind of institutional setup they should have after the Second World War. The other two people I looked at in this book, Carl Schmitt<sup>15</sup> and Hermann Heller<sup>16</sup>, did not play much of a role. Schmitt was an enemy of liberalism and democracy and in a way the German constitution was designed to preclude his kinds of arguments from ever having a real hold in German constitutional law again. Heller was a social democrat and, in my view at any rate, a much better constitutional theorist than Schmitt, but he died in 1933 and his influence waned after his death, which I think is the major reason why he has little influence in Germany today. Although there is something of a Heller revival going on at the moment and he is almost unknown in the English-speaking world.

**38. As you know, we have a supra-European constitutional system in the making and I wondered if there are any lessons from your theorists for this?**

That I am afraid I can't answer. Yes, well, I could tell you what some of these theorists might have said. So Schmitt thought that an authentic constitution had to express the values of what called the "substantive homogeneity of the people," a really dangerous and nasty idea in the context of late Weimar and in Hitler's rise to power. There was a period of a few years when he aspired to and actually became the chief jurist for the Nazis. And so he would have thought that this idea of a supranational constitution is completely foolhardy. Why? Because it isn't attached to any authentic conception of a people. And it's possible that Heller would have been similarly sceptical. Kelsen, I think, would have had no problem with it at all.

**39. That brings us to your appointment in 1998 to the Professorship of Law and Philosophy at Toronto. Were there any special circumstances to this appointment?**

Well, it's important to understand that in North America becoming a full professor is just an indication that you are making the right sort of progress through the ranks. So you start off as an assistant professor. When you get a tenure you are promoted to an associate professorship and, indeed, some law faculties promote people immediately to a full professorship after they survive the tenure process. In Toronto and in most other North

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<sup>12</sup> Julian Rivers, Professor of Jurisprudence, University of Bristol (2007-).

<sup>13</sup> Rudolf Smend (1851-1913), German theologian on constitutional and ecclesiastical law.

<sup>14</sup> Hans Kelsen (1881-1973). Austrian jurist, legal and political philosopher.

<sup>15</sup> Carl Schmitt (1888-1985), German philosopher, jurist and political theorist. He joined the Nazi Party on 1 May 1933.

<sup>16</sup> Hermann Heller (1891-1933). German legal scholar and philosopher.



American institutions if you produce the right kind of research after tenure you will after several years be promoted to full professor. So it doesn't for the most part bring you any greater status, it doesn't give you a bigger salary or any perks, it's just progress through the ranks.

**40. So it didn't lighten, for example, your teaching duties or your administrative duties?**

No, not in the slightest. In fact, I probably was rewarded with much heavier administrative duties because I was both willing and I had established myself as a scholar. So my law faculty – and this is common – will try to avoid loading people up with administrative duties in their junior years just because it's thought better to give them the space in which to get their research careers started.

**41. I am not sure if it's the same system here. I was under the impression that at a junior level you do have to do a lot of...**

Yes, I think things work almost in reverse here. And certainly at Cambridge and most other universities in this country I think becoming a chair is a much bigger deal, right, because in the past there were only a few named chairs then universities started creating personal chairs for people. There are some universities and I think the LSE is kind of leading the charge here, which are trying to switch to the North American system.

**42. Really. So during this time, from 1992 to 2008, you had several sabbaticals and we have spoken briefly about your time at Heidelberg. You also came to Cambridge in 2006 and then you went to New York in 2008, but that's in the future. In 2006 you were the Herbert Smith Visiting Fellow at Pembroke and I wonder what the circumstances were in that regard?**

I suppose it was actually my third time in Cambridge, so I can't remember exactly the year I was here before but it would have been about in the late '90s, I think, or maybe even in the early 2000s. Sorry, in Toronto one can take one's sabbatical in two segments so instead of having a full year which one is entitled to in one's seventh year, one can take six months in one's fourth year and then six months in one's seventh year and because we have a very long summer where we have no teaching duties, really three months off teaching duties, that means one can get nine months away and so I did that twice in Cambridge. And the reason that both my wife, who is a philosophy professor at the University of Toronto, and I wanted to come to England was that we really like England and we have friends here, family here, lots of good academic contacts and we both thoroughly enjoyed our time in Oxford. The reason that we came to Cambridge is for me in large part academic, it's because of the presence of Trevor Allan<sup>17</sup> here, he is one of the people I have worked very closely with over the years. And it's also personal, in that two of our closest friends from graduate school, who are a couple, have lived in Cambridge all this time.

**43. Do you find that Oxbridge is conducive to the work that you undertake, particularly so in terms of the resources?**

Although, what are the resources? The books and journals one can get anywhere. So it's people to talk to and in a way there are more people not only in Oxbridge but at places like the LSE, Glasgow, all over the UK that I find I have a great deal in common with intellectually. There are more such people in the United Kingdom than there are outside of

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<sup>17</sup> Professor of Jurisprudence and Public Law, Pembroke College.



the United Kingdom so it's really valuable for me to be here and when people learn that I am here, just because it saves them the cost of a transatlantic airfare, I get lots of invitations to speak, so I got to places and learn new things and so in that way it's really fruitful for me to be here.

**44. You published your book on “Judging the Judges” also in the time-frame that we are just dealing with, since you became a professor at Toronto. “Judging the Judges, Judging Ourselves”<sup>18</sup> in 1998 was based to a large extent on your own personal involvement in the Truth and Reconciliation Commission. I wonder if you could describe the circumstances of your involvement and could perhaps summarise the conclusions that you came to in this very important book?**

Well, my family and I had gone to South Africa. Both my wife and I had a six month academic leave and I partly wanted to go there because we have friends and family there and also I wanted to actually see what it was like to live in South Africa again. I wasn't hankering after going back but I was just interested to spend several months in the new South Africa and my academic project at the time was to work on the privatisation of the state with no particular reference to South Africa. But it so happened that the Truth and Reconciliation Commission was in the middle of conducting its hearings during the time that we were in South Africa and friends in the legal community told me that the Truth and Reconciliation Commission, about which I knew very little at the time, was going to conduct a hearing into the role of lawyers and judges during apartheid. So we were in Cape Town on our leave but the hearing was to be in Johannesburg and I phoned one of the TRC officials in Cape Town and asked about what it took to go to the hearing, I just wanted to know whether I needed permission or... and when he heard that I was in South Africa and wanted to go to the hearing he persuaded me to give testimony at the hearing, which I had had no thought of doing, I just wanted to go and listen. And what became clear to me afterwards was that at the time that I phoned the Truth and Reconciliation Commission, Archbishop Tutu<sup>19</sup>, who was in charge of the whole show, was engaged in a dispute with the South African judiciary because he wanted the South African judges to come and testify at the commission and the judges refused. Some of them made written submissions but they thought that if they subjected themselves to the interrogations of the commissioners their judicial independence would be compromised. And the person I spoke to at the TRC, whose name I forget now, anticipated that with the right kind of hints I could be relied on to try to rip to shreds the South Africa judges' argument for not appearing at the commission, so they had me go first and in this way try to set the tone for the rest of the hearing.

**45. I noticed that one of the reviewers of your book is a public lawyer here, Professor Christopher Forsyth<sup>20</sup>, and he maintains that concerning your criticism of the judges refusing to appear, that their action was understandable. He said that it might have split the new judiciary and the new modus vivendi, and he says that the judges swore to, and I quote, “Administer justice in accordance with the law and the custom of the Republic of South Africa.”**

Well, Christopher Forsyth and I have been disagreeing about legal theory for a long time. So when I first encountered him, both through his writing and in person, he was

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<sup>18</sup> *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford, Hart Publishing, 1998).

<sup>19</sup> Desmond Mpilo Tutu (b. 1931-), South African social rights activist, Archbishop Emeritus of Cape Town.

<sup>20</sup> Christopher F. Forsyth, Barrister (Inner Temple), Professor of Public Law and Private International Law, Robinson College, University of Cambridge.



teaching at the University of Cape Town and at that time he was putting forward a positivist account of law and of the role of judges in a legal order and this was an account which, so I was taught by John Dugard and I accepted his teaching, should be rejected. So I always thought and I have spent my career arguing that when judges interpret the law they are misled if they think that there is some matter of fact about the law waiting to be discovered. Rather, whatever conclusions the judges come to are going to be influenced not only by the legal materials that are at their disposal and that they have to take into account, but also by their views in regard to the ideal that they think that law serves. So I always thought there was a great deal more room to manoeuvre for judges in the apartheid legal order than Christopher thought, and the argument in my first book and then in the “Judging the Judges” book is that, to the extent that judges fail to exploit this room, they were in dereliction of duty. And then the further argument I made to the Truth and Reconciliation Commission was that the old order judges, so the judges from the apartheid days, who refused to come to the commission, kind of compounded their dereliction of duty by refusing to come. I probably now wouldn't make that argument, I probably would be more sympathetic with Christopher's conclusion that it was in the interests of maintaining the legal order that judges refused to come, and I would have rather different reasons for getting to that conclusion.

**46. I understand. That brings us to your fourth major work, which is “The Constitution of Law: Legality in a Time of Emergency”<sup>21</sup>. Could you describe for us the circumstances of writing this book?**

Well, the circumstances in a way go back to my earliest work on South Africa because that work concerned not only the legalised system of racial oppression in South Africa but also the system of security laws that were put in place to stamp out political opposition. And so I had in the work on South Africa written a great deal about national security law and the problems that arise when one designates people as terrorists and security risks and so on. And then when I worked on Weimar legal theory these issues came to the fore again because in Weimar there was one state of emergency after another, especially in late Weimar. And so then September 11<sup>th</sup>, 2001 happened and suddenly North American legal and political scholars became interested in these issues for the first time. State of emergency, national security and so on. Only these issues of course had been discussed at the time of the Second World War and during earlier crises but for a long time there had been very little interest in the North American academy. And so in a way I was quite well placed to deploy arguments that I had made in the past in an effort to understand what was going on in North America and elsewhere after 2001.

**47. This book was published in 2006 which would have been the time that you were visiting Cambridge. I had wondered whether you were using that time in Cambridge to finish off your book.**

I think it might have been finished before I came to Cambridge. Because I was invited, and this was just fortuitous for me, to give a series of lectures here. So there is a series of lectures named in honour of a South African and former a chancellor of this university, Jan Christiaan Smuts<sup>22</sup>, and I think it's not tied to law but there is a fund available to bring a lecturer to Cambridge to give a set of lectures on broadly speaking, let's say, commonwealth themes.

I had been working on various topics to do with states of emergencies, security issues

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<sup>21</sup> *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

<sup>22</sup> Jan Christiaan Smuts (1870-1950) South African and British Commonwealth statesman, military leader and philosopher. SA Prime Minister (1919-24, 1939-48).



after September 2001 and I decided to use this opportunity that the invitation gave me to produce a manuscript on which the lectures were based and then it could be revised in light of the reception that the lectures got for a book.

**48. One of the reviewers, Dr Agata Fijalkowski<sup>23</sup>, at Lancaster University, made a point which I thought was rather interesting. She said that you imply that the UK has a permanent state of emergency and is abandoning the rule of law and she also makes the point that there isn't redress at the European Court of Human Rights because it deals only with personal liberties. So I wondered whether you thought that the Court of Human Rights could solve this problem by addressing areas of common law liberties, because this would take these things out of the hands of the state at a stroke.**

Yes, I'm not sure I even saw that review but just the little bit you have reported on it makes me worry about what I thought I was saying in the book because I certainly didn't intend to make that kind of claim. In fact, when it comes to the United Kingdom the book, as I recall, tells quite an optimistic story because it tries to show that despite some missteps, generally speaking the judiciary here was furthering the project, which I call in the book the "rule of law project" and actually doing a much better job of it than their counterparts in the United States of America and in Canada. And I saw a very helpful set of exchanges between at that point the House of Lords and the European Court of Human Rights, so I thought that things were actually moving in the right direction if one is a rule of law enthusiast, as I am.

So the book was meant to issue some kind of warnings about going down the wrong path but as I recall, generally speaking I thought that here the judges in conjunction with other institutions were steering things in the right direction.

**49. Currently you are the Goodhart incumbent in the Arthur Goodhart Chair of Legal Science and I wonder how you felt up to now your time here has been. Have you found it very fruitful for your research? Could you tell me something about your experiences in this chair?**

Well, as I was saying to someone I bumped into on the stairs coming in today, one of the IT people here, he said to me, "Well, it must be the case that three or four months of your time here is up?" and I said that these were just the words that strike fear into my heart because at the moment I never want to leave. So the experience so far has just been wonderful and I trust that it will continue that way. So I can try to tell you what I think the ingredients of this sense of things being wonderful are. So first of all, the Goodhart Chair is a great idea. Well, it's a house that is remarkable just outside of the city centre, which makes life here really comfortable. The walk from this house through the meadows to the Law Faculty is one of the most stunning walks I have ever been on, so it just gives me pleasure to go to work. And there is a very generous stipend given to the professor so one feels materially well off as well. And then one is in Cambridge and I have the access I described earlier to colleagues, both here and elsewhere in the UK through being in Cambridge. Cambridge itself I have always found somehow is just a very fruitful place to try to think about the intellectual issues that I am interested in. And then the time here is actually just the kind of time I like to have when I am away from my home institution. That is, I don't have any administrative duties except for the Editor of the University of Toronto Law Journal and that I can't abandon, so I run it from here. But otherwise, other than that I have no administrative duties and I have a very reasonable teaching load. And I like to combine

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<sup>23</sup> Agata Fijalkowski, Senior Lecturer, Law School, University of Lancaster. Review in: *International Journal of Law in Context*, 2007, 389-395, at p. 391.



teaching with research so that the fact that I am talking about issues that I am interested in to a bunch of students at the same time as I am trying to work out those issues for them in their own right has always seemed to me to be exactly the right sort of combination.

**50. And have you found the students receptive to your ideas?**

Well, I taught last term a, I think it's called a half-course, to undergraduate law students, so that's one hour a week for two terms, it continues into this term. And I am teaching a course on what you would call the "legitimacy of judicial review". Now, this is not a course that's going to attract a lot of undergraduate students. I think there are seven students formally enrolled in the course and then some auditors but the students who are enrolled are there because, as far as I can tell, they seem genuinely interested, very smart, willing to participate in the discussions in class. And we are about to start dealing with a set of topics which is going to be completely strange to them. We started off with debates in legal theory about the legitimacy of judicial review, but debates in the UK and in the USA and even though they might not have encountered these writings before, these are debates which will not be unfamiliar to them from some of their law courses. But this term we are actually dealing with Weimar legal theory and the debate between Kelsen and Schmitt about who should be, as they termed it, the "guardian of the constitution", and this will take the students into completely unfamiliar territory but from what I have seen of them so far they are more than up for it. And then this term I am teaching the second part of the LLM Jurisprudence Seminar with Trevor Allan. Nigel Simmonds<sup>24</sup> and Antara Haldar<sup>25</sup> taught it in the first term. And we are actually going to be focusing, Trevor and I, on this exchange that I mentioned to you earlier, that is the exchange between Hart and Fuller about the Nazi legal order. That's the launching pad for our part of the course. This takes me back many years but it also brings me to topics that I am still now working on today. And while I haven't met this class yet properly – our first session is on Monday morning – from what I have heard from both people in the class and from those who taught the class last term, they are a very engaged smart bunch so I am greatly looking forward to them.

**51. Well, that brings us to the end of this conversation and I thank you very, very much for a truly fascinating account. I am extremely grateful to you. Normally there is a chance for me to talk to the Goodhart Professor again at the end of their tenure in June/July or August, so I hope that will be possible.**

Yes, I will be here until the end of July.

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<sup>24</sup> Nigel Simmonds, Reader in Jurisprudence; Director of Graduate Education; Chair of the Degree Committee, Corpus Christi College.

<sup>25</sup> Antara Haldar University Lecturer in Empirical Legal Studies.

