

Conversations with Professor David Dyzenhaus

by

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This is the ninth 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.

52. Professor Dyzenhaus, it is six months since we conducted your first interview and soon you'll be returning to Canada. When you spoke in January, you said somewhat jocularly that the prospect of leaving Cambridge and the Goodhart chair struck fear into your heart because at that point you didn't want to leave; the experience thus far had been wonderful, and I wondered if the last six months have lived up to your expectations?

Well, the last six months have indeed lived up to my expectations. Now that I have only two days left in Cambridge, I feel even worse about leaving, but I should also be clear that I will be very happy to return to Toronto, so at the moment I'm really torn. I don't want to leave here; happy to go back.

53. Could you summarise the courses you gave and any perhaps interesting research projects that you were able to undertake?

Well, I taught one course all of my own that was a half course in the undergraduate law degree and that course was on the legitimacy of judicial review and it attracted only seven students plus some auditors, but the students were a really good bunch. One of them was one of the most remarkable students I think I've encountered in all my years of teaching, so it was a real pleasure to teach that class. The other course in which I participated was the LLM jurisprudence class, seminar, and in that seminar Trevor Allan³ and I taught the second term of the seminar. The first term was taught by two other members of the faculty.

54. Apropos your research and speaking of Hobbes⁴, you wrote a chapter in the book that you edited with Dr Thomas Poole⁵ on *Hobbes and the Law* published by CUP in 2012 and you cited Hobbes in your most recent *CLJ* article which we can refer to later. You mentioned on page 1 of the Hobbes book that his ideas were becoming particularly

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⁴ Thomas Hobbes, (1588-1679), English philosopher.

⁵ Thomas M. Poole, Senior Lecturer, London School of Economics



prominent in recent years and I wondered whether you had the opportunity to do any research on Hobbes while you were here.

I didn't really do dedicated research on Hobbes. I wrote one paper on Hobbes right at the beginning of my first couple of months which I then gave as a lecture here in a series organised by Matt Kramer⁶.

55. That was in January?

Yes.

56. I remember the seminar. I attended that.

And Hobbes is a figure I've been working on for probably ten or 12 years, ever since I became convinced that if one wanted to find someone who at the beginning of the modern era had thought through the problem of the legal state in quite a lot of detail, then it's to Hobbes we should turn. That goes against the orthodox view of Hobbes because Hobbes is reputed to be a rather crude command theorist of law; all there is to law is the commands of a legally unlimited sovereign. But I think if one reads Hobbes' texts on law with some attention, one gets a much more nuanced picture of the way that the state is legally constituted in the modern era, and that's a problem that I've been working on for several years, trying to understand the authority of the legal state.

57. Interesting. What, to summarise, would you say has been the highlight or highlights of your time in the Goodhart chair?

Well, it's hard to say. Being in Cambridge for a year is a kind of highlight in itself and being exposed to the law faculty in a way that I hadn't been before. I think I probably mentioned in our last interview that I had spent two six months' leaves in Cambridge prior to spending the year here, but getting a glimpse into the way the law faculty actually works, how examinations are conducted, that I thought was a real privilege which I wouldn't have got as just an ordinary academic visitor.

58. When you return to Toronto, are there any new topics that you will introduce to your courses that you may have developed in your time here?

Well, the seminar course in which I participated for the LLM, the part that Trevor Allan and I taught, is a course that I've been teaching at various levels for many years at Toronto and elsewhere. So, from that course I don't think I would really take anything new back to Toronto. The course on the legitimacy of judicial review is a course that I taught for the first time and I wanted to teach such a course for the first time. I wanted to do something that would be new for the students and new for me, and I will definitely be working with the material and the ideas that I took from that course.

59. You've been elected to a fellowship at the Wissenschaftskolleg⁷ in Berlin for 2016/17 academic year and I wonder if you could tell us something about this honour and what you plan for this?

Well, the Wissenschaftskolleg is a dedicated research institute and it brings together a bunch of people from different disciplines, really very different disciplines, so I might be the

⁶ Professor Matthew Kramer, B.A. (Cornell); J.D. (Harvard); Ph.D., LL.D. (Cambridge), F.B.A. Professor of Legal and Political Philosophy, Churchill College, Legal philosophy, political philosophy, moral philosophy.

⁷ The Wissenschaftskolleg zu Berlin was founded in 1981. The purpose of the Kolleg is to offer scholars and scientists the opportunity to concentrate on projects of their own choice for one academic year, free from administrative duties. <http://www.wiko-berlin.de/en/institute/>



only lawyer and legal theorist there and this might include architects, musicians, poets. The idea there is with other such research institutes is if you throw a bunch of people together for a year and make them talk to each other then they will find out things that otherwise they wouldn't have found out. So, the only requirement at this research institute as far as I know is that you make yourself part of the community. So, you've go to lunch, you go to dinner occasionally and you talk to the other people, you participate in the events and otherwise you do your own work but somehow there's supposed to be a kind of energy created by having people from very different disciplines together for a year.

60. You would be there for the year?

Yes, from July of next to July of the following year.

61. So, there will be a little space when you'll be in Toronto first?

Yes. So, I will be in Toronto for a year and I'm hoping during this year in Toronto to consolidate the various themes I've been working on over the last few years and then to work those up into a book when I'm in Berlin.

62. Also I saw on the Toronto Faculty of Law website that on June 3rd it was announced that the Faculty had named you as University Professor which is, to quote, "one of the most prestigious and competitive designations bestowed by the University of Toronto on its Faculty". I wondered if you could comment on that or tell us something about that?

I don't, I confess, know much about origins of this position. My guess is that because in North America becoming a professor is not a big deal in the way that it is in the United Kingdom, so it's really just progress through the ranks, and this is something we might also have talked about, I can't remember. So, you start off as an assistant professor, as long as you do the right sort of things when it comes to both research and teaching and taking some of the administrative load of your unit, you will become eventually an associate professor and then a full professor. So, I think the idea of the university chair or professorship is to mark out a group of people who've achieved something academically that wouldn't be expected of the ordinary full professor.

63. I see.

And the way that it works as far as I know, because it's a confidential process, is that someone has to nominate you, I presume the head of your faculty or department. Then a bunch of paper has to be collected about you including referees' letters and then the part that I do know is that people who are already university professors then decide on whether you are eligible to be a university professor and then the number, the percentage is capped so only a certain percentage of the total of professors at the university of Toronto can be university professors. So, I guess the way that it works is that someone like me who works in legal theory and public law has to be presented to chemists, engineers, whoever else has made it to this supposedly august rank as someone who's worthy of joining them.

64. I understand. So, it's not just a question of one appointment each year. There may be several?

No, there were I think two this year and some years there might be three but I would doubt that there are ever more than that because in a way they just have to keep renewing the number that's already there.



65. If we could just move now to your two publications which you mentioned when I asked you if there had been any output since January. There was a book that you cited and an article in *Cambridge Law Journal* and perhaps we can just talk about the book first. This is forthcoming and edited with Professor Malcolm Thorburn⁸ who is actually an ex-student of yours and who is now at Queens University in Kingston.

He's actually now a colleague of mine, so.....

66. At Toronto?

At the time we started editing this book he was at Queens University, but he's been a colleague of mine now in his second year at Toronto.

67. And the title "*Philosophical Foundations of Constitutional Law*" is intriguing. I wonder if you could tell us something about this volume?

Oxford University Press has a series, "Philosophical Foundations of... Law", so they've had property law, contract law, international law and one of the law editors at Oxford University Press approached me a few years ago to ask whether I would edit the volume on philosophical foundations of constitutional law. Then when I agreed to do that he sought out Malcolm Thorburn to be my co-editor and so, is it a year ago?, so more or less a year ago we put on a conference at the University of Toronto where most of the contributors to the volume came and since then we've been busy giving them comments. I think we gave them two or three sets of comments on revised drafts of their papers and finally it's all come together.

68. Your own chapter has the title: "What is a constitution? A plea for *Staatsrechtslehre*". I wonder if you can tell us the gist of this?

Well, it struck me when I was thinking of what I wanted to write about, it seemed appropriate that someone writes a paper in this volume about what a constitution is. The title of the collection is "Philosophical Foundations of Constitutional Law", that there's really little agreement amongst both public law theorists and philosophers of law about what a constitution is. There seems to be an agreement that every legal order has a constitution, but beyond that there's very little agreement and that presented one difficulty and then there's a second difficulty and that is that a certain style of doing legal philosophy, which is a style you refer to later on in this list of questions that you've sent me, that is the legal positivist style, it doesn't really engage with constitutional theory at all.

So, I wanted to first of all try to say something about what it is that every legal order has in having a constitution and do so by creating an engagement between constitutional theory and legal philosophical theory which often seems to be missing in the literature, and the idea of *Staatsrechtslehre*, which is an idea I take from the German tradition of public law, is that the way to understand most of what legal philosophers do is as an attempt to understand the authority of the state. So, going back to an idea that I mentioned when we were talking about Hobbes and what is the authority of the legal state and why do at least some theorists and philosophers, and I think many people, suppose that the authority of the state is in some way a legitimate authority so that when the state makes a claim on us it claims with right? So, that's really the set of ideas that I look at in that chapter.

69. Which brings us then to your article in the *Cambridge Law Journal* which appeared this month, "Process and substance as aspects of the public law form", and this was

⁸ Malcolm Thorburn, B.A. (Hons.) (Toronto); M.A. (Pennsylvania); J.D. (Toronto); LL.M. (Columbia); J.S.D. (Columbia) is an Associate Professor at the University of Toronto Faculty of Law.



delivered originally in the conference, “Process and substance in public law” in September 2014 and I looked at the conference website and noticed that there were a great many foreign common law speakers. I wonder if you could say something about the significance of this topic as a subject matter for a conference?

It’s a very significant subject matter within the common law thought of the different jurisdictions that were represented at the conference and in a way it’s one of the main themes of public law in common law countries. So, judges usually try to confine themselves when they’re engaged in judicial review to procedural issues on the basis that it’s illegitimate for them to trespass into the substance of administrative decisions when public officials have been given authority by the legislative to make those decisions, but I think and have thought for a long time that the distinction between that process and substance is a very difficult one to make and in this paper, the one that appeared in the *Cambridge Law Journal*, I tried to show that process and substance are intrinsically connected because they are aspects of what I call the public law form. So that’s the form that public policy has to take in order to become law, and that connects with the other ideas that I’ve just mentioned because it seems to me that the authority of the legal state is deeply bound up with the form that policy has to take before it will be recognised as binding on those who are subject to it. So, policy has to be put, or as I say in my more recent work, policy has to be converted into a legal form and I think that that conversion process which is a procedural matter, so it’s a process, has an effect on content and this is where I’m trying to find the link between process and substance.

70. In your paper, which started as your contribution to the conference, you summarise your conclusions on page 287, and I quote, you say that: “Whilst I reject some of legal positivism’s key claims, I also find that there’s much in the positivist account that is essential to understanding the formal structure of public law”, and I found this very interesting and I wondered how this squared with what you said in your earlier interview in question 45 in relation to Professor Forsyth⁹ who was teaching at the University of Cape Town at that time, and I’m quoting: “He was a 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 Dugard¹⁰, and I accepted his teaching, should be rejected”.

My position is that the great contribution of legal positivism has been to draw our attention to the form of law, to the formal features of legal order and of particular laws. But where legal positivism falls short is that I don’t think legal positivism really sees that when public policy takes legal form, the fact that it has to take a legal form in order to be implemented as law does have an effect on the content of the law. Law is not just a transmission belt for public policy. Putting public policy into law actually changes the content of the policy and on the other hand, critics of legal positivism have neglected, I think, form and have focused too much on substance. So, I am trying in my own work to show that actually there are insights that should be taken from both the positivist contribution to the way that we think about law and from the critics of legal positivism who might have focused too much on substance.

⁹ Christopher F Forsyth, (1949-), Professor of Public Law and Private International Law, Robinson College, University of Cambridge.

¹⁰ Christopher John Robert Dugard, (b. 1936 -). South African Professor in Public International Law, Leiden University. Dean and Professor of Law, University of Witwatersrand (1975-1977), Director of the Lauterpacht Centre for International Law, University of Cambridge (1995-1997).



71. You mentioned the works of Thomas Hobbes in your *CLJ* paper to the effect that your formal theory of public law owes much to Hobbes, this is on page one. You said that the your formal theory of public law owes much to Hobbes. Could summarise what this means?

Hobbes set out in, mostly in Chapter 15 of “*Leviathan*”, a list of what he called the laws of nature and it’s clear that these laws are binding on the state or the sovereign, as he called the state, though it’s not that clear how these laws are binding. I think that the way to understand Hobbes is, as the great English political theorist Michael Oakeshott ¹¹ suggested, as putting forward a kind of grammar of law that any legal state has to abide by if it’s going to be a legal state that is to rule through law and not by some other means. This is a very interesting idea of natural law because it’s not the traditional Thomastic idea of natural law where perhaps what natural law is, is some moral view which owes its origins ultimately to God and with which positive law has to coincide if it is going to be law. Rather, it’s an attempt to understand the structure of law and to see in what way that structure of law is normative, and that idea is an idea which I think is resurrected, without any reference to Hobbes, by Lon Fuller ¹² in the twentieth century and his idea of there being a principles or desiderata, what he calls an internal morality of law, that even a tyrant has to observe if the tyrant wishes to govern by law and not by some other means. I actually think that Hobbes has a better account of how this all works than Fuller which is why in my more recent work I’ve not turned away from Fuller but at least sought help from Hobbes in trying to flesh out this picture.

72. Interesting. Still on your article, you frequently mention the Hart ¹³ and the Fuller debates of 1958 which you also said in your first interview you and Professor Allan intended to focus on in your teaching of the Nazi legal regime and I was reminded of this when I read Geoffrey Lewis’¹⁴ biography of Francis F A Mann ¹⁵ that apparently Mann inadvertently involved himself in a House of Lords case in 1976 via a law court review article published in ’73 on the *Oppenheimer v Cattermole* case where the legitimacy of a 1941 Nazi decree on Jews’ German citizenship was at issue, and Mann’s opinions affected the outcome in which two of the law lords declared that laws like the Nazi decree of 1941 were a violation of human rights and ought not to be dignified by recognition in English courts. While this sentiment is understandable from a moral point of view, in general cases and in practical terms and in strongly divided societies, who would you say is ultimately to decide on such cases if no positivist notions are allowed as to what the law is?

¹¹ Michael Joseph Oakeshott, (1901-1990), philosopher and political theorist, Professor of Political Science, London School of Economics 1948-69.

¹² Lon Luvois Fuller, (1902-1978), Professor of Law, Harvard

¹³ Herbert Lionel Adolphus Hart, (1907-92), Professor of Jurisprudence Oxford University (1952-69). Author of *The Concept of Law*, 1961.

¹⁴ Geoffrey Lewis was a pupil, partner and friend of Francis Mann in the law firm of Herbert Smith for more than thirty years. He retired in 1990 to write. This is his fifth book. The others are lives of Lord Atkin, Lord Hailsham, Sir Edward Carson and a study of the Balfour Declaration. He is married with four children and lives near Saffron Walden.

¹⁵ Francis A Mann, (1907–1991), solicitor, Jewish emigré to UK from pre-War Germany, specialising in public international law and international monetary law, the doctrine of jurisdiction in international law, the law governing state contracts, problems faced in the courts in cases involving foreign affairs, conflict of laws, and arbitration.



I think I would want to take issue with about the last five words of your question because I don't see why one has to throw positivistic considerations out of the window if one wants to engage in the kind of analysis that two of the law lords did in *Oppenheimer and Cattermole*. So, even in a deeply divided society, there will be consensus about what the raw materials of law are. For example, if the legislature does certain things then an output is produced which we call a statute and that statute has to be taken seriously by officials including judges if it seems relevant to working out what is to be done in regard to someone's conduct. But then still a bridge has to be built in working out exactly what the impact is that this piece of legal material, this artefact will have on the particular individual, and there I think considerations come to bear which have to do with what Hobbes thought of as the laws of nature or what Fuller thought of as the principles of the internal morality of law and for the most part, except in very unusual legal orders, one will be able to find an answer that is consistent with both recognising this artefact as an artefact of the legal order and interpreting it in light of the principles, which will make it possible to work out an appropriate impact of the artefact on those who are subject to it.

There will be limit cases where one can't actually come up with a satisfactory answer and I don't think that in advance of examining any particular limit case one can say what the answer should be. Now, the *Oppenheimer and Cattermole* case was not that problematic. Why? Because it was judges in this legal order looking at an artefact that had been produced in another legal order and refusing to let that artefact have an impact that it might ordinarily otherwise have had within their own legal order. It would be much more difficult if they were, say, looking at a statute that came from within their own legal order that was still, formally speaking, on the books.

So, to give you an example, there was a very interesting case in Canada some years ago called the Chinese Head Tax case, so at the turn of the twentieth century and later, Chinese immigrants to Canada had to pay an exorbitant head tax on entry to Canada. I forget the exact figures but it amounted to about two years' expected wages. Eventually Chinese immigration was closed off altogether, and some years ago a couple of very old surviving payers of this head tax as well as some of their descendants brought a claim in unjust enrichment against the Canadian government and this claim was thrown out of court on the basis that there was a valid juristic reason for this taking, so there couldn't be unjust enrichment.

What was the valid juristic reason? There was a statute which prescribed imposing the head tax and that statute was valid by all the tests of the time, so the court said there's just no reasonable basis for this action. So, I think there one gets an example which is more difficult for the courts to deal with because it's a valid law within their own system. I'm not sure that the Canadian courts did the right thing in allowing that law to have force into the future in the way that they did, but in each of these cases one has to make a very careful argument about what one thinks the impact is, and if the artefact has all the force that those who put it in place thought it should have, despite the fact that it violates the principles of legality as I would call them, I think there's a severe problem for that legal order.

73. Well, that brings us to the conclusion of this interview, and all that remains is for me to thank you very, very much indeed for these fascinating insights which I know will be of great interest to our listeners and our readers. Thank you very much. I'm extremely grateful to you.

Well, my thanks go to you. Thank you.

