THE LONG ARC OF LEGALITY

The Long Arc of Legality breaks the current deadlock in philosophy of law between legal positivism and natural law by showing that any understanding of law as a matter of authority must account for the interaction of enacted law with fundamental principles of legality. This interaction conditions law's content so that officials have the moral resources to answer the legal subject's question 'But, how can that be law for me?' David Dyzenhaus brings Thomas Hobbes and Hans Kelsen into a dialogue with HLA Hart, showing that philosophy of law must work with the idea of legitimate authority and its basis in the social contract. He argues that the legality of international law and constitutional law are integral to the main tasks of philosophy of law, and that legal theory must attend both to the politics of legal space and to the way in which law provides us with a 'public conscience'.

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Hobbes, Kelsen, Hart

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For Louise and Carole

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PREFACE

'The arc of the moral universe is long, but it bends toward justice', said Martin Luther King, Jr. I make a similar claim about the long arc of legality, the arc of the idea of government under law. Legality's arc bends towards justice of a special kind, the justice intrinsic to the legal order of the modern state. I trace the trajectory of that arc from Thomas Hobbes to Hans Kelsen and HLA Hart, the foremost legal positivist philosophers of the twentieth century.

Hobbes is one of the founders of legal positivism if by that label we mean that there is no more to law than what people have 'posited' or put in place in order to organize the common life of their society. In the modern era, the power to make law is centralized in the institutions of the state. Law is made by those who have authority to do so within the legal order of the modern legal state. Why, then, have philosophers spent so much time on constructing a theory to explain the role of law in our common life? The reason is the tricky transition from 'power' to 'authority'. How is sheer political power transformed into legal right, the right to tell legal subjects – those subject to the state's power – what to do?

Hobbes, Kelsen and Hart all thought that a theory of law must account for law's authority, but without making such authority depend on a source outside legal order, whether divine will or some secular ideal of justice. Thus, legal positivists traditionally reject rival 'natural law' theories because such theories do, in their view, trace the authority of law to some moral source outside legal order. That leaves positivists with the arduous task of solving the puzzle of legal authority – how law transforms might into right – without reliance on anything external to law.

I argue that their legal theories do contain a solution to that puzzle. Law's authority is due to the fact that legal order affords to its officials resources which enable adequate answers to legal subjects who ask 'But, how can that be law for me?' That's a long answer and it takes a long book to set out. It requires following me through a close reading of texts by my principal figures, often against the orthodox understanding of

their work, and with Kelsen and Hart at times against their self-understanding.

It is against Kelsen's and Hart's self-understanding, as I argue that they could not help but become natural lawyers in their bid to understand law in the register of authority. They needed to incorporate (and in fact largely did) many of the insights associated with Gustav Radbruch, Lon Fuller and Ronald Dworkin, the twentieth-century natural lawyers who argued both that there are moral resources which ground law's authority and that these resources are wholly internal to legal order.

My reading is not, however, or so I claim, against Hobbes's self-understanding, at least because he was untroubled by our labels like 'legal positivism' and 'natural law'. His philosophy of law is a theory of the positive law of the modern legal state in which ultimate legal authority is understood as power exercised in compliance with an extensive list of the 'laws of nature'. He, of course, also claimed the state has authority because its subjects must accept that they consented to be ruled by its law. They consent through contracting with each other in the state of nature to put in place the state and its representative in the sovereign who rules in their name. That may seem to make the source of authority both external and deeply troubling, as it relies on the fiction of an original social contract to arrive at the conclusion that the sovereign has unlimited authority. Subjects are under a duty to obey the law, whatever its content. For this reason, legal positivists since Bentham have rejected social contract theory in general and Hobbes's version of it in particular, as have contemporary natural lawyers.

Proper attention to Hobbes's legal theory shows, however, that the legal order of the modern legal state internalizes the social contract in the way in which law mediates the relationship between ruler and subject. Moreover, the same attention to Kelsen and Hart, in particular to parts of their work which may seem anomalous at first, shows that they could not help but rely on the social contract idea in their attempts to solve the puzzle of legal authority. In so doing, they also committed themselves to Hobbes's view that the law of a society amounts to a 'public conscience'. Law has a moral quality to it just in being law and so must be given appropriate weight by both legal officials and subjects in their deliberations.

In support of these controversial claims, I show how they help us to understand contemporary debates about the constitution of the modern legal state and the way in which its legal order relates to 'law beyond the state', in particular international law. But, as I also show, engagement

with these debates is necessary because the internal legal order of the state cannot be understood without engaging in these debates. Questions about constitutionalism and the legality of international law are integral to the main tasks of philosophy of law.

Three caveats are in order. First, I claim in the Introduction that this book is in part an 'homage' to Hart. One reviewer suggested that this claim may seem a little disingenuous since I am highly critical of Hart in these pages and Kelsen emerges from them as the 'real hero'. But I do stand by that claim. I have been reading and rereading Hart's *The Concept of Law* for over forty years. Each time, and right up until the present, I have discovered some new and profound insight in his deceptively pellucid prose and my arguments here are largely prompted by an engagement over these years with his legal theory.

Second, the reader must contend not only with length, but also with the many quotations which populate the text. One participant in a manuscript workshop commented that I should make my own voice emerge more from the thickets of names and quotations. But I came to appreciate more as I revised the manuscript why my argument needs those names and quotations. That argument consists in my best possible assembly of ideas developed by philosophers of law who have made their task explaining the authority of the modern legal state, and the quotations are necessary to support those interpretations of their work which on occasion go against the grain of orthodoxy.

Third, the ideas assembled are those of dead white Western men. Even my living interlocutors are almost all white Western men. And dead or alive, their task is unsurprisingly one of elucidating a theory of a form of state developed in the West. Their and my legal theories are thus in some deep sense parochial, or, as I would prefer to say, situated in a particular kind of experience. In Chapter 6, I suggest that legal theory should in general be so situated. For the moment, I claim only that understanding this form of state is worthwhile because, whatever its origins, it has been exported to pretty much the rest of the world. In addition, while that export was undertaken in the service of empire, colonialism and neocolonialism, it is important to get the legal theory of that state right if we want to understand how law can be both an instrument of oppressive state power and a source of resistance.

The attempt to understand how law enables resistance as well as oppression began when I was a law student in the 1970s in apartheid South Africa. In the version set out in these pages, it began when Alberto Puppo and Raymundo Gama invited me to spend a week in 2015 giving

lectures in the Eduardo García Máynez Seminar at ITAM (Instituto Tecnológico Autónomo de México). The topic of the seminar was philosophy of international law and I put together as a basis for my lectures a very rough manuscript composed of my work-in-progress – the first draft of this book – with a focus (new for me) on international law. I thank Alberto, Raymundo and the students who participated in the seminar for their generosity in engaging with this draft.

Since then I have worked on and off on trying to wrestle that manuscript into better shape. I intended to finish it during the academic year 2016/17 when I had a fellowship at the Wissenschaftskolleg zu Berlin. While the Wissenschaftskolleg proved a most productive place to do sustained research, I discovered that I could not proceed before developing my view of the debate between Kelsen and Hart about the legality of international law, a task which consumed the year. That debate became pivotal to my argument and I thank the Wissenschaftskolleg for this wonderful opportunity.

The academic year 2020/1 gave me the time I needed for a final set of revisions and I thank the Guggenheim Foundation which awarded me a fellowship for this period.

In the meantime, the manuscript has been through many drafts and I owe thanks to a number of people who have helped me in this process. The most important intervention was a manuscript workshop which Geneviève Cartier organized at the Montreal campus of her university in June of 2018. I thank Geneviève and Sherbrooke University for making this event possible and also all those who participated in a day and a half of intense discussion of the manuscript: Evan Fox-Decent, Colin Grey, Hoi Kong, Hugo Lafrenière, Finn Makela, Mark Walters and Jacob Weinrib. Hugo, I should mention, provided me with a summary of the entire discussion as well as with detailed comments on a draft of the Introduction.

I have over the years enlisted several talented students at my university as research assistants, both writing memoranda on discrete topics and giving me no-holds-barred criticism of my drafts. My thanks go to Haim Abraham, Manula Adhihetty, Ryan Deshpande, Matthew Oliver, Kerry Sun and Andy Yu. Manula deserves a special mention for a set of careful and challenging comments on the bulk of my penultimate draft. I also thank the students in my MA Philosophy of Law seminar in 2018 on whom I inflicted a draft of the whole manuscript, especially Eric Wilkinson whose term paper 'Hart and the Moral Foundation of Law' helped me to formulate some key thoughts.

Several colleagues from outside my university have contributed greatly to this project over the years, and I thank them for their friendship and their scholarly support. Geneviève Cartier, Evan Fox-Decent and Mark Walters need another mention in this context and my enduring thanks go as well to Trevor Allan, Rueban Balasubramaniam, Nehal Bhuta, Hassan Jabareen, Santiago García Jaramillo, Murray Hunt, Aileen Kavanagh, Matthew Lewans, Karin Loevy, Janet McLean, Tom Poole, Arie Rosen, Kristen Rundle, Benjamin Straumann, Rayner Thwaites and Lars Vinx. I also thank three anonymous reviewers for Cambridge University Press for their detailed and helpful comments on the project.

The University of Toronto and my two homes in it in Law and Philosophy continue to provide an excellent environment for scholarship and Ed Iacobucci, Dean of Law, during most of this period, and Martin Pickavé, Chair of Philosophy, were unstinting in their support. Three colleagues and friends have been especially influential as I worked through my arguments. Jutta Brunnée and Karen Knop have patiently tried to educate me in international law over the years, informally in our 'international law drinks' sessions, more formally through being willing each to teach a seminar with me, with Karen on 'Foreign Relations Law' and with Jutta on 'The Rule of Law in International Law Theory'. I have been resisting Arthur Ripstein's attempts to turn me into a Kantian for many years, but there is hardly an issue canvassed in this book unmarked by our conversations.

Four other institutions have been tremendously important to me in the writing of the book. First, I have taught several times as a Global Visiting Professor in the Law School of New York University. My colleagues in legal theory there have been most important to the development of my ideas, especially Richard Brooks, Benedict Kingsbury, Lewis Kornhauser, Mattias Kumm, Liam Murphy, Richard Stewart and Jeremy Waldron. The same is true of the students, most of all in my Jurisprudence course in 2018 on whom I tried out many of my arguments as we went through *The Concept of Law* together. In particular, Alma Diamond, Teng Li and Meir Yarom have provided me with novel insights into old problems.

Second, there is the University of the Witwatersrand in Johannesburg where I studied political theory and law and had my first academic position. The seeds of the ideas in this book were all planted there by my teachers. I have recorded before my special debt to John Dugard. John taught me Jurisprudence, though he did not regard himself as a theorist, and only taught the course because he thought it important that

students be concerned with the legal nature of the apartheid state. That course set me on the inquiry in which I am still engaged forty years on. John's real passion, however, was for international law, a field in which he achieved great eminence. His International Law course was in fact my favourite in my LLB degree and here I have attempted to return to the rest of the issues to which John introduced me.

Third, there is the University of Oxford where, in my DPhil thesis, I made my first sustained attempt to set out a view of the legal nature of the apartheid state under the direction of my main supervisor, Ronald Dworkin. For our first session, I presented Dworkin with a Marxist and positivist analysis of some judgments in which judges differed about how to interpret apartheid law. 'But', he asked, 'who do you think was right?' That question changed the course of my thesis and I hope to have made more progress towards answering it since 1988, the year I defended the thesis. It gives me much pleasure to put the final touches to that answer back in Oxford, and I thank All Souls College for the visiting fellowship during which I completed this book.

Fourth, I thank Cambridge University Press and its dedicated staff, not only for agreeing to publish this book, but also for publishing the three collections Tom Poole and I edited which came out of workshops we organized, and which facilitated a collaboration most important to the development of my arguments. Finola O'Sullivan has been my editor at the Press throughout a relationship which began in 2004 when I gave the JC Smuts Memorial Lectures to the Faculty of Law at Cambridge. Sadly, she will be gone from that role before this book is published. I will be far from alone in sorely missing her singular warmth and dedication to her authors.

Last, there are some more personal thanks. I have discussed the issues I grapple with here with Cheryl Misak since we met as graduate students in Oxford. Her influence on my work has been immense. Much more important is everything else she contributes, together with our children Alexander and Sophie, to my happiness. My dedication is to my sisters, Louise Spitz and Carole Lewis, for more than sixty years of love and care.