



A WORK IN REGRESS (AND WHY THAT'S
A GOOD THING)
DAVID DYZENHAUS

David Dyzenhaus is a Professor of Law and Philosophy at the University of Toronto and a Fellow of the Royal Society of Canada. He was appointed in 2015 to the rank of University Professor. In 2014/15, he was the Arthur Goodhart Visiting Professor in Legal Science in Cambridge. He is the author of *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (now in its second edition), *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, and *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*. He has edited and co-edited several collections of essays. In 2004, he gave the J. C. Smuts Memorial Lectures to the Faculty of Law, Cambridge University. These were published by Cambridge University Press in 2006 as *The Constitution of Law: Legality in a Time of Emergency*. He is editor of the *University of Toronto Law Journal* and editor of the series *Cambridge Studies in Constitutional Law*. – Address: University of Toronto, 78 Queen's Park, Toronto, Ontario, M5S 2C5, Canada. E-mail: david.dyzenhaus@utoronto.ca.

A week ago, two weeks from the end of my year at the Wissenschaftskolleg, I started work in earnest on my project for the year. I came here with the draft of a book manuscript, titled *The Long Arc of Legality*, which seeks to show that Thomas Hobbes provided a sophisticated legal theory of the modern state that, when properly elaborated, can help to sort out pressing problems in contemporary philosophy of law. Given that I had a manuscript of some 200 pages in reasonably good shape, I thought it would be fairly easy to revise it to the point where I could submit it to a publisher at about this time.

With that in mind, and because I did not want to spend the year fretting about my colloquium on my work in progress, I signed up for the first available colloquium. That event happened in October. I found it daunting but very useful to prepare a talk for biologists, novelists, a photographer, humanists of every description, and so on. And I thoroughly enjoyed both the attempt at conveying to this audience my ideas about the role of legality in constructing our legal and political orders and the question period that followed. But I did get two questions, one from the Rector, Luca Giuliani, another from a fellow Fellow, Katharina Volk, that set me a clutch of puzzles. Both questions focused on the role of the legal subject in my account, as I want to make central to philosophy of law the question posed by someone subject to law: “But, how can that be law for me?”

My argument is intended to show that once we see that the modern legal order is structured by principles that make it possible for the subject to get an answer that enables her to make sense of her subjection to legal authority – to understand why such authority is legitimate – the way is open to make progress in philosophy of law. In particular, we can get over the impasse in current debates between legal positivists and natural lawyers, i.e., legal theorists who argue that there is no necessary connection between law and morality and those who argue that law always has a moral quality to it.

As it happens, I had also arrived with a standard set of commitments: to write three papers, one for a festschrift and two for conferences; and after the colloquium I decided to finish work on the first before I turned to my main project. But when I attempted that turn I found myself stuck, except for a brief interlude when I was inspired for a few days by a wonderful colloquium on the history of capitalism by Mary O’Sullivan, which suggested to me a way of dealing with the complexities in the account I wish to set out. I then decided again that I was making no headway and turned to the other papers I had to write, because it seemed to me that I could use them, in combination with the first, as a vehicle for solving the puzzles set for me at my colloquium.

These three papers circle around the same set of problems, the role of the legal subject in philosophy of law, the relationship between the public law of national order and international law, the relationship between the private law regimes of different national orders, the reach of national public law rules beyond the territorial borders of the state, and the role of social contract theory in explaining constitutional, legal order. And in all three, the central figure is the great Austrian legal positivist Hans Kelsen, since it seems to me that once I can show how legality’s arc stretches from Hobbes to Kelsen, my project is done.

I finished the third paper just a few days ago and presented it at a workshop, magnificently hosted by the Wissenschaftskolleg on “The Double-Facing Constitution”. The workshop brought together academics from Canada, the USA, New Zealand, the UK, and Berlin, and for a day and a half we had intense discussion of what became our dominant theme, first articulated in my abstract, of “the Janus-faced constitution”. This idea refers to the fact that a constitution looks both inwards and outwards. That fact, however, is equivocal. Janus is usually thought of as the Roman god of doors, and doors can be shut and barred against the outside. But he is also the god of *doorways*, thresholds, passages, and transitions, which gives us an alternative way of understanding the act of self-constitution as not an exclusionary, but a liminal act – one that establishes not a barrier so much as a threshold or point of transition between spaces. I draw attention to this only because the idea was directly inspired by Cornelia Jöchner’s description of her project at the Wissenschaftskolleg, as well as her colloquium, on the place and history of the facade in architecture.

With that paper done, I am now in a position to start work on my project in earnest. So in a real way, my year has been a “work in regress” (a line I stole from Guy Stroumsa’s colloquium talk). But since I had, as I discovered, to go backwards before I could begin to go forward, I cannot think of a more productive way to spend a year.

Of course, having a year to spend thinking and writing about these kinds of issues is in itself invaluable. But there is also the magic of the Wissenschaftskolleg. One can point to the tangible things that are the preconditions for the magic to happen, both the generosity of all the people who worked tirelessly to make things so easy for us to have a productive year and the social and intellectual company of my fellow Fellows and their partners, who quickly formed a friendly and collegial community. But the whole is much, much bigger than the sum of its parts.

Here is one of many illustrations of how the Wissenschaftskolleg worked its magic. Another of the projects I undertook this year was to preside over a translation of a book by Hermann Heller. Heller was one of the leading public lawyers and legal and political theorists of the Weimar era, which is high praise, as his main interlocutors were two of the giants of twentieth-century legal and political thought, Hans Kelsen and Carl Schmitt. However, Heller is hardly known outside of Germany, in large part because he, a Jewish socialist and militant opponent of the Nazis, died in exile in Spain in 1933, aged 42. This book – *Die Souveränität: Ein Beitrag zur Theorie des Staats- und Völkerrechts* [1927] – is his attempt to intervene decisively in a debate about sovereignty to which both Schmitt and

Kelsen had already made important contributions. Oxford University Press has agreed to publish the book in their series, *The History and Theory of International Law*, and I engaged a translator to prepare an initial draft of the translation. She and I have been over this translation line by line three times and it is now complete. Once I go over the text one more time and write a long introduction, the task will be done.

The Wissenschaftskolleg provided an ideal environment for this work. First, there is the serendipity that Heller wrote the book near the Schlachtensee, just a few kilometers from Grunewald. Second, the incomparable librarians were able to supply me with the material, often very hard to find, that I needed from time to time. Third, Heller assumed that his many quotations – Latin, Greek, French, Italian – needed no translation, and I could (and did!) call on my fellow Fellows and their partners (Barbara Kowalzig, Giacomo Todeschini, Jim Zetzel) for help with translation and on a theologian (Michael Moxter) and an historian of the Church (Hubert Wolf) for help with some of his allusions.

Finally, I must mention that the magic of the Wissenschaftskolleg extends to the partners of Fellows. Cheryl Misak, my wife, is a philosopher who works on pragmatism. She is writing an intellectual biography of Frank Ramsey, who died in 1930 just before his 27th birthday, but managed in his short life to make contributions of the first importance to philosophy, economics, and mathematics. Her significant progress on this project was in large part made possible by the librarians who procured hundreds of books and other material that would have been hard to find in any one institution and who took care to reassure her that, as the partner of a Fellow, she was just as welcome to this magnificent resource. She was also helped by some of my fellow Fellows who were happy to help her navigate the areas of Ramsey's extraordinary reach.

These last weeks are strange, marked by the last colloquium, the last book the librarians will get for us, the last time Dunia and her fabulous staff in the kitchen make some last-minute adjustment so that they can serve a guest a delicious meal, the last trip to the shops or the Floh along Hasensprung, the last run or bike ride in the Grunewald, and above all the last time I will go to lunch in happy anticipation of sitting for at least an hour in the company of people whom I did not know a year ago, but now know in a way that usually takes two decades in an ordinary academic institution.

While it will be hard for both of us to leave the Wiko, the inevitable day will be made bearable by the knowledge that these friendships will be lasting ones.