LAW'S MIMICRY OF LAW

JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER, David Dyzenhaus (Oxford: Hart Publishing, 1998)

Es ist eine alte Geschichte,
Doch bleibt sie immer neu

- Heine

Violations of laws and lives have been numerous in this century of heightened and brutal efficiency, but they also have a long ascendancy in the history of humankind. Two features nevertheless may be said to distinguish the modern era of human barbarism from its past incarnations. First, modern atrocities occur despite the widely shared, and probably to some extent subliminal, view that respect is due to those who sincerely hold differing beliefs and values, by virtue of the sincerity and integrity of the believer, rather than because of the substantive nature of the beliefs. Isaiah Berlin has described the transformation of the west from a past in which truth was not only thought to be absolute, but in which those who knew themselves to be in possession of truth had no qualms about killing others who disagreed, utterly irrespective of whether those "others" held their views sincerely.[1] In the modern era, by contrast, the integrity of the value holder and the sincerity of believers in their beliefs has been thought to warrant respect by virtue of the believers' honesty and integrity, independent of the substantive nature of the beliefs.[2] Strangely, this widespread evolution seems neither to have halted or diminished the ferocity of human cruelty towards other humans, nor to have slowed in modern times the propensity of humans to immerse themselves in xenophobic tribalism and even to indulge in mass murder. History, in other words, has not borne out what one might have thought to be a promise of tolerance emanating from the modernist respect for differences of perspectives.

Secondly, modern times have seen the use of law to pervert law. It is this disturbing feature that is the focal point of David Dyzenhaus' new book, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*.[3] The author presents his book as an examination of the role of the judiciary in apartheid South Africa, and an exploration of the value of the Truth and Reconciliation hearings as a way of dealing with the transition from apartheid to post-apartheid government. An unspoken, implicit subtext concerns yet another tragedy that modernity has unfurled from the depths of the human psyche: the guilt of the innocent who cannot forgive themselves for emerging unscathed from a society that persecuted others.

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1 See I. Berlin, *The Roots of Romanticism*, ed. by H. Hardy (Princeton: Princeton University Press, 1999) at 10.

2 *Ibid.*

3 D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998) [hereinafter *Judging the Judges*].

However harsh may be Professor Dyzenhaus' indictment of South Africa's judges for their role in maintaining, in enforcing and, ultimately, in legitimizing apartheid, it seems still harsher of himself. Having been born white, he was among those who profited from what he describes as the "extended system of socio-economic pillage based on race"[4] that was apartheid. He blames himself for having abandoned the problem by emigrating to Canada, where he now is a professor of law and philosophy at the University of Toronto. His references to himself are scant, but the book bristles with the implicit self-indictment of one who feels he has suffered too little, a hallmark more commonly associated with the survivors of twentieth-century totalitarian societies. In *The Origins of Totalitarianism*, Hannah Arendt explained the ultimate, tragically inevitable complicity with evil of every member of totalitarian societies save those who are slaughtered.[5] Her insight was further developed by Bruno Bettelheim's analysis of the "survivor's guilt" syndrome of concentration camp survivors. Innumerable memoirs of holocaust survivors also provide evidence that camp survivors were haunted for the rest of their lives not just by the trauma of their past victimization, but by their sense of guilt for not having perished.[6] When measured against the stolid self-satisfaction of the many apartheid-era judges who not only refused to appear at the Truth and Reconciliation hearings, but who also profess not the slightest twinge of remorse, Professor Dyzenhaus' self-reproach provides a striking and moving contrast.

The role of the courts comes into question in two ways: on the one hand, the judiciary's role in furthering the aims of an evil system; and, on the other hand, whether the courts are the appropriate forum for resolving issues (arguably in large measure political) that arise as a successor régime deals with a predecessor régime's acts, laws and values. In opting for the Truth and Reconciliation hearings, South Africa rejected the model of formal trials that dominated in Europe after the Second World War, a model that has continued more than half a century after the relevant events took place. The pitfalls of the formal trial model are numerous, including an inevitable misuse of legal proceedings for the purpose of fashioning historical memory and concretizing the political and social values of a current society and political system.[7]

Professor Dyzenhaus makes a compelling argument for the advantages of Truth and Reconciliation, especially in the context of South Africa, in which the hope remains that former antagonists will be able to join together to build a new country. Despite the contrary affirmed goal of ridding post-war Germany and France of the influence of former Nazis and Vichy collaborators, both of those countries' governments and judiciaries remained riddled with the alleged undesirables, an unavowed result that

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4 *Ibid.* at viii.

5 See H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1951).

6 See, *e.g.*, B. Bettelheim, "Trauma and Reintegration" in B. Bettelheim, *Surviving and Other Essays* (New York: Alfred A. Knopf, 1979) at 19-37; E. Wiesel, "Notre commune culpabilité" in E. Wiesel, *Le Chant des morts* (Paris: Editions du Seuil, 1966).

7 For my analysis of the use of this model in the context of the recent trial of Vichy collaborator Maurice Papon, see V.G. Curran, "The Legalization of Racism In a Constitutional State: Democracy's Suicide in Vichy France" (1998) 50 Hastings L.J. 1, 73-94.

generated yet new problems.[8] Germany also adopted the model of formal trials more recently after reunification. One of the problems feared as a consequence of this choice concerns the numerous acquittals: "[M]any Germans have criticized the use of criminal prosecutions as a means of coming to terms with East Germany's offensive past. The many acquittals, they fear, could undermine East German trust in the rule of law and make the *Rechtsstaat* look undignified and ineffective."[9]

A more compelling reason to favor South Africa's model emerges from Professor Dyzenhaus' focus on historical memory as a primary task in proceeding from apartheid to post-apartheid society. The configuring and reconfiguring of memory is one of the ultimate goals of addressing the past, whether by judicial or non-judicial procedure. It is also a way of restoring dignity to those whom the prior system had robbed of a voice. The building of an archive of truth is a goal expressed by Professor Dyzenhaus repeatedly throughout the book, both for the sake of informing the contemporary population, and for posterity.

The conduct of judges in adjudicating evil law is a central theme of the book. Professor Dyzenhaus deals with this issue with considerable subtlety, although in this area he reaches conclusions with which I do not agree completely. An initial question is whether a judge who is called upon to interpret evil law should reach a legal decision consistent with true justice and inconsistent with governing statutory law, or whether the only response of a responsible judge is to resign his position.

Professor Dyzenhaus is not sparing in his criticism even of liberal judges, and indeed, as he himself points out, often seems harshest when criticizing apartheid-era judges who were liberal. Here his criticism is similar to the reproach Richard Weisberg levels against the French Vichy-era judges: namely, that by adjudicating at all, even liberal, kind-hearted judges lent legitimacy to the repressive laws, or, rather, to measures enacted by the powerful that appeared as law but that did not have the fundamental qualifications to be deemed law at all.[10] According to Weisberg, even the judge who finds a way to show leniency to an individual defendant by contorting the plain meaning of a racist statute ultimately serves the cause of racism rather than justice by virtue of *purporting* to apply the racist statute. Whereas Weisberg generally seems to imply that the ethical response for the judge is to refuse to participate in what is merely a mockery or mimicry of law, Dyzenhaus favors judges' remaining in office and reaching outcomes consistent with such fundamental values as equality and due process.

He recounts with respect and admiration the story of Bram Fischer, an Afrikaans lawyer who ultimately decided to go underground, but he does not suggest that

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8 For a defense of the German option for trials by a judge on Germany's Constitutional Court, and a somewhat critical appraisal of South Africa's procedure, see J. Limbach, *Im Namen des Volkes: Macht und Verantwortung der Richter* (Stuttgart: Deutsche Verlags-Anstalt, 1999) at 78-85.

9 I. Markovits, "Reconcilable Differences: On Peter Quint's *The Imperfect Union*" (1999) 47 Am. J. Comp. L. 189 at 216.

10 See R. Weisberg, *Vichy Law and the Holocaust in France* (New York: New York University Press, 1996).

Fischer's response should have been followed *en masse* by the South African judiciary. Rather, he seems to validate the decision to remain on the bench, but only to the extent of each judge's refusal to acknowledge the validity of invalid laws, such as the *Terrorist Act* of 1967, which allowed for the detention of political dissidents under barbarous conditions.

The judicial dilemma of the liberal judge has been the subject, among others, of an essay on Alessandro Galante Garrone, an Italian judge who sat on the bench during the time of Mussolini's fascist régime.[11] As recounted by Danièle Lochak, Garrone at first sought to undermine fascism by rulings that favored its targets of persecution, but ultimately decided that he could not fight fascism effectively from the bench and went underground.[12] Dyzenhaus repeatedly refuses to endorse the view that going underground was the only just, or even the most reasonable, response by judges or lawyers to the repressive laws of apartheid. He believes that resistance from within was the better course, on the theory that the fundamental common-law principles of South African law, being in direct contradiction to the statutory laws that promoted and enforced apartheid, trumped statutory law and, therefore, opened the way for apartheid-era judges to do justice within the law.

This argument certainly might be applied to the Nazi-era judges of Germany and occupied France as well. Here we enter into the much-disputed territory of positivism's role in furthering the evil of evil legal systems. It is in this area that I disagree with Professor Dyzenhaus, although I recognize that his argument is more nuanced than many made by other scholars.[13] My general conclusion is that he blames positivism excessively, attributing to positivism a greater role in the debacle of law under evil régimes than I consider justified. Positivism has been blamed frequently for the Nazi-era judges' decisions, but it was mostly the judges themselves who attempted to exculpate their own previous behavior by claiming that a legal culture of strict obedience to the law was really the blameworthy party. Their practices and subsequent disingenuous attempts to claim innocence have been recounted in meticulous and compelling detail by Ingo Müller in his book, *Hitler's Justice: The Courts of the Third Reich*.[14] A closer look at German legal tradition indicates, however, that, while French legal culture had a tradition of strict adherence to the letter of the law, dating from the Revolution, Germany on the contrary did not. The German judiciary had long prided

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11 See D. Lochak, "Le juge doit-il appliquer une loi inique" in M. Olender, ed., *Juger sous Vichy* (Paris: Editions du Seuil, 1994) at 29-39.

12 See *ibid.* For more on Judge Garrone's resistance activities and post-war resumption of his profession, see M. Assimov, *Primo Levi: Tragedy of an Optimist*, trans. S. Cox (New York: The Overlook Press, 1998) at 3, 262-63, 294-95, 296-99, 400.

13 For a fuller presentation of my views on the role of positivism in judicial decision-making, see Curran, *supra* note 7 at 30-45. An interesting aspect of Dyzenhaus' argument is the extent to which it relies on legal principles unique to common-law, rather than civil-law, legal systems.

14 See I. Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. D.L. Schneider (Cambridge: Harvard University Press, 1991).

itself on being, as John Dawson has put it, the conscience of the nation, free to shape the meaning of law as it saw fit.[15]

While the French courts proclaimed "*un franc est un franc* ("a franc is a franc"), refusing to allow themselves the flexibility of rectifying the horrific injustices thereby wrought in conjunction with rampant inflation, German judges well before Hitler's time were reinterpreting and rewriting the unmistakably clear language of contracts so as to provide relief from their punishing and wholly unintended effects on certain parties to contracts formed before the onset of the German inflation that raged out of control in the 1920's. The German judiciary's freedom of interpretation took the form of its favoring Germany's *Generalklauseln*, just the sort of vaguely stated basic legal principles that Professor Dyzenhaus advocates as the desirable basis for judicial adjudication. The judiciary's freedom of interpretation, so profoundly understood by none other than the Nazi legal theorist Carl Schmitt, did not, however, attenuate the furor of Nazi-era judicially-implemented terror. In France meanwhile, despite the judiciary's time-honoured refusal to do anything remotely resembling legislating, numerous courts nevertheless adjudicated in ways that contorted and subverted the Vichy-era racist laws.[16]

The problem for judges of recognizing and rejecting laws that are merely grotesque mimicries of law (laws like Hitler's Nuremberg laws of 1935, Pétain's *statut des juifs* of 1940, and South Africa's *Terrorist Act* of 1967) spills over from the legal and judicial world into the amorphous world of underlying individual and institutional values. Ernst Cassirer, who himself had been hounded from country to country during the Second World War, grasped the nature of the dilemma:

> The self-preservation of the state cannot be secured by its material prosperity nor can it be guaranteed by the maintenance of certain constitutional laws. Written constitutions or legal charters have no real binding force, if they are not the expression of a constitution that is written in the citizens' minds. Without this moral support the very strength of a state becomes its inherent danger.[17]

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[15] See J.P. Dawson, "The General Clauses, Viewed from a Distance" (1977) 29 *Rabels Zeitschrift* 441.

[16] For a superb analysis of French judicial decisions from 1940-1944, see Weisberg, *supra* note 10. See also R. Weisberg, "Legal Rhetoric Under Stress: The Example of Vichy" in *Poethics: And Other Strategies of Law and Literature* (New York: Columbia University Press, 1992) at 143-82. One instance of the French judiciary's leniency that more recently came to light concerns Alfred Steg, currently a member of France's Mattéoli Commission, a governmental commission constituted to analyze the extent of property never yet returned by French banking and other institutions to Jews dispossessed during the Vichy years. In 1942, warned of an imminent round-up of Jews, Steg managed to hide, while his father was arrested for deportation to Auschwitz. The younger Steg was arrested soon afterward by French police when he tried to flee to the unoccupied zone by means of forged papers. The French court that tried him freed him, presumably in direct contravention of applicable positive law. See C.R. Whitney, "A Survivor Helps Track French Debt of Wartime" *New York Times* (12 September 1999) 4.

[17] E. Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946) at 76.

Thus, until and unless judges reject the system and values generating oppressive statutes, it is unlikely that increased or different training in judicial methodology, as suggested by Professor Dyzenhaus, will remedy the problem.

The Truth and Reconciliation hearings, as rendered in Professor Dyzenhaus' book, capture the misery and suffering of a nation. At times almost unbearable to read, it is a fascinating account of the human dimensions of law's effect, an illustration of Robert Cover's thesis that law does not merely perpetrate and depend on violence, but that it *is* violence.[18] Professor Dyzenhaus argues that law can also offer the promise of justice. In this respect, the book is as much about hope as it is about pain. In accumulating the sordid evidence of the past, the Truth and Reconciliation hearings are not just setting the record straight. They are also laying foundations for a new society with a different conception of justice.

Professor Dyzenhaus' book shares the blend of anger, sadness and hope that Dullah Omar, a member of the Executive Committee of the African National Congress and Minister of Justice of South Africa, expressed in a talk he gave recently at the Georgetown Law Center, at a conference on comparative constitutional law. With some measure of bitterness, Omar pointed out to a group largely focusing on the potentials for effective constitutional protection of minorities that in South Africa it was not a minority, but rather the vast majority, that had been oppressed and repressed, and that South Africa's constitution reflects this historical context. His speech reflected a bitterness and weariness perhaps wrought by centuries, and by the enormity of the task still ahead, but it also resonated with the vigor and spirit of a pioneer. The highlight of the conference for me was the speech of another South African, Dennis Davis, a law professor and judge, who spoke of the process by which South Africa developed its Constitution, of legal issues peculiar to South Africa, of tentative resolutions, and of the future. One felt that, whatever mistakes might still be made, South Africa is after all a unique and tremendous success story. His speech dwelled on how to approach the legal dilemmas that are arising already and that demand great judicial effort and creativity, but that, finally, are being played out on a terrain of legal equality. It was an uplifting epilogue to Professor Dyzenhaus' book.

Judging the Judges is singularly effective in combining a scholarly dissection of legal issues with an underlying, passionate quest for justice. To this reader at least, it was a page-turner, as the author alternated among legal theory, argument, and testimony. In the context of the voices of the dispossessed, quoted word for word, no doubt can remain as to why the questions this book poses are vital, or as to whether we need be concerned with trying to formulate and articulate the theoretical underpinnings of judicial systems and the appropriate conduct of judges.

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[18] See R. M. Cover, "Violence and the Word" (1986) 95 Yale L. J. 1601.