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Edwin Cameron and the politics of legal space

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> The complicity of all judges who held office under apartheid is therefore incontestable. But this applies not only to judges. All lawyers who participated in the legal system "legitimated" it, and were thus also complicit. This includes not only lawyers who supported apartheid and who acted for the government, the police and other apartheid institutions in its enforcement, but also lawyers who considered themselves "politically neutral", and who pursued their commercial and other activities within the framework created by apartheid. It includes even lawyers who actively opposed apartheid through the legal system. In their case, by their continued participation in the legal system, they lent it the respectability and plausibility that was essential to the continuation of its role as an instrument of apartheid.[1]

If any label captures Edwin Cameron's career of high achievement in so many dimensions of human activity, including his present role as Inspecting Judge of Correctional Services, it is 'human rights lawyer'. Here I will seek to show how what I call the 'politics of legal space' both makes a career of human rights lawyering possible and explains why it is so fraught. My argument begins with an account of a debate Edwin and I had in the 1982 South African Law Journal in our first published articles.[2]

While Edwin won that debate, I found less embarrassing than expected rereading my naïve foray into legal scholarship. I am still seeking to answer, albeit quite differently, its concerns in a book I have just finished,[3] and they inform my current project on 'the politics of

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1 E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436 at 436.

2 E Cameron 'Legal chauvinism, executive-mindedness and justice: LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38; D Dyzenhaus 'LC Steyn in perspective' (1982) 99 *South African Law Journal* 380.

3 D Dyzenhaus *The long arc of legality: Hobbes, Kelsen, Hart* (2022).

legal space'. Both Edwin's career as a human rights lawyer and some of his written reflections on the dilemmas such a lawyer faces, whether as academic, practicing lawyer, activist, or judge, help to illustrate and develop that argument. Moreover, his own argument, made in the context of South Africa in the 1960s and 1970s, provides important insights into recent legal developments in two of the longest established democracies, the United States of America and the United Kingdom, in which prominent jurists are advancing the interests of illiberal and anti-democratic politicians.[4]

Part 1 sets out the context in which that initial debate occurred and sketches the issues at stake. Part 2 explains where my argument went wrong in its failed attempt to grasp the political theory of Alisdair MacIntyre, on which my response to Edwin largely relied, and shows that I would have done better to employ John Finnis who, like Carl Schmitt, proposes a mode of reasoning designed to undermine legality in the service of a deeply conservative ideology. My argument relies on a rather substantive understanding of legality and, in part 3, I elaborate it through an account of ideal types of state. As part 4 explains, where a state is placed on the 'continuum of legality' tells us whether human rights lawyering is possible at all, while part 5 explains why it is always morally fraught in just the way Edwin describes in the epigraph to this chapter. Human rights lawyers in a deeply unjust regime cannot help by their practice but to bolster the legitimacy of the regime. Moreover, as we will see Edwin later argued, they should learn from this fact that, even in a more or less just regime, they still risk legitimising injustice.

1 A debate in 1982

In Canada, where I have taught since 1990, students, after the first year of the law degree, choose their courses from the wide array offered. In contrast, when I studied law at the University of the Witwatersrand in the late 1970s, there were only two occasions in the three-year degree when one had any choice, and then it was between two options. Jurisprudence

4 On these developments, see D Dyzenhaus 'Schmitten in the USA' *Verfassungsblog* (4 April 2020), an article on Harvard Law Professor Adrian Vermeule; and D Dyzenhaus 'Lawyer for the strongman' *Aeon* (12 June 2020), an article on Oxford Law Professor John Finnis.

thus had equal status as compulsory with contracts, property law, and criminal law.

My own law class was no different in makeup from many of the classes I have taught in Canada. Most of the students were there because of the promise of law as a secure high-earning profession if one jumped through the hoops well enough. Jurisprudence was thus hardly popular – a 'useless' subject, considered irrelevant to practice. For a small group in my class in 1979, though, jurisprudence was a breath of fresh air. Several of us had 'majored' in political science, in reality a political theory department in which a three-year immersion in Marxism produced students divided only by whether we followed the Frankfurt School or the austere French School headed by Louis Althusser. But that distinction hardly mattered. Much more important was that our teachers made it clear how relevant the concepts we were learning were to understanding South Africa in a period when the 1976 Soweto Uprising had happened during our undergraduate degree and during which the black trade union movement was becoming a force to be reckoned with. Moreover, we could read in issues of the *New Left Review* articles by South Africans analysing our society using the very concepts we were writing about in our own papers. It was thus a shock to arrive in a law school in which nearly all our teachers regarded as irrelevant to law-teaching the fact that we were living in a country in which law imposed a system of white supremacy and gave vast powers to the police and security agencies to crush opposition as they pleased.

Consider that HR Hahlo and Ellison Kahn, the two dominant figures at the Wits Law Faculty in the post-war period, published in 1968 *The South African legal system and its background*, the set text in our introductory law course.[5] At the beginning of this immensely learned book, the authors dealt with debates about legal positivism and natural law and the relationship between law and justice. They even mentioned Gustav Radbruch's famous critique of German lawyers for their allegiance to a legal ideology that helped pave the way for Hitler's accession to power, as well as his claim that extreme injustice invalidates an otherwise valid statute.[6] But apartheid did not figure as a topic. Indeed, at a time when the statutory edifice of apartheid was

5 HR Hahlo & E Kahn *The South African legal system and its background* (1968).
6 Hahlo & Kahn (n 5) 22-23.

fully in place as well as statutes that shielded the police and the security agencies from the rule of law when it came to their repression of political opposition to apartheid, Hahlo and Kahn asserted that it 'is difficult to imagine that the courts of South Africa could ever be faced with this issue', that is, the issue of an 'outrageously unjust statute'.[7] The overall impression they sought to give is that their legal order was unusual only in its combination of Roman-Dutch sources with English common law.

The main exception at Wits was John Dugard. He presided over two courses in the curriculum, international law and jurisprudence, and ensured that the concepts in both were taught in way that had a direct bearing on the lived experience of apartheid South Africa. When I took jurisprudence in 1979, John had just published his influential book *Human rights and the South African legal order*[8] and his work required the small group of left-wing students to try to make juridical sense of apartheid law, that is, to use legal concepts and categories as well as the political economic categories which we had learned. He also required us to take rights seriously – and here I evoke the title of a book published two years before, *Taking rights seriously* by Ronald Dworkin, the Professor of Jurisprudence in Oxford.[9]

However, while John took rights very seriously, and wanted us to do the same, he was no Dworkinian.[10] He rejected Dworkin's view that judges in 'hard cases' determine the 'one right answer' which the moral

7 Hahlo & Kahn (n 5) 24. The only reference to 'apartheid' is in the note to this claim, fn 14. There Hahlo and Kahn placed a lengthy quote from D Lloyd *The idea of law* (1964) 103, which starts: 'Suppose for instance we take the position of those in present-day South Africa who are persuaded that the repressive racial laws of apartheid are fundamentally immoral'. Lloyd goes on to conjecture that the natural lawyers in this group who have been thus 'persuaded' might think that the laws are invalid because of their injustice. But he finds their position flawed because, first, they would have to establish that there is natural law and, second, that it forbids inequality. In addition, there will likely be other natural lawyers who think that the law of nature 'decrees inequality'. It is unclear what work Hahlo and Kahn thought this quotation did for them. Perhaps citing an English source in a footnote permitted them to mention 'apartheid' without saying anything about it themselves. Perhaps they also thought that Lloyd's simplistic view of natural law supported their position that 'the repressive racial laws of apartheid' were not important to an understanding of the South African legal system.

8 J Dugard *Human rights and the South African legal order* (1978).

9 R Dworkin *Taking rights seriously* (1977).

10 D Dyzenhaus 'Dugardian legal theory' in T Maluwa, M Du Plessis & D Tladi (eds) *The pursuit of international law in a brave new world: Essays in honour of John Dugard* (2017) 1.

principles implicit in the law demand. Instead, he proposed a 'realist' view that judges in controversial cases have a legally unconstrained 'discretion' to decide as they see best. He relied on the idea of discretion to criticise the stance that dominated the mindset of South African judges. For judges in South Africa, like all judges, claimed that they were upholding the rule of law by deciding their cases in accordance with what the law as a matter of fact required, not, that is, on the basis of their views as to the merits of the law.

John's view was quite congenial to our small group. It offered us a resource to criticise the apartheid judiciary because they were exercising a legally unconstrained choice while pretending there was no choice. We could keep as the basis of the criticism our Marxist analysis of the role of the legal superstructure in maintaining the material substructure of the apartheid economy. The judges were, that is, doing their part to maintain the political economy of apartheid South Africa.

This was not, however, an easy marriage of beliefs since any Marxist analysis was inclined to the view that political struggle within the law for 'bourgeois' rights was counterproductive, as made vividly clear by the racist form of capitalist production in South Africa and the role of law in sustaining its structures.[11] I suspect that the marriage was severely challenged when we were exposed to a set of lectures by Edwin who had just arrived to teach at Wits from his Oxford undergraduate law degree in which he had both won the Jurisprudence prize for top law graduate and become a Dworkinian. This is only a suspicion, however, because all that I recall from that part of the course, hard to believe as I find this now, is that Edwin seemed very nervous in his lectures. The basis for my suspicion is that I still have my copy of *Taking rights seriously* from that year and my marginalia reflect the flippant dismissiveness of a twenty-year-old 'Marxist' confronted by arguments to which he was incapable of responding.

11 A point well illustrated when John and the other lecturers asked me and Halton Cheadle to give the lecture in the session devoted to 'Marxism and the law' just because of our interventions in class over the year. Halton had just started work at the Centre for Applied Legal Studies which John had established. He had emerged from a banning order because of his activity as a trade union organiser in Natal with a law degree by correspondence and was adding the LLB degree to his credentials while setting up the labour law arm of the Centre. As I recall, our session consisted of a rather relentless critique of the course.

In 1982, I emerged from my two-year stint as a conscript in the apartheid military with my Marxism if anything reinforced by the experience and began my career as a junior lecturer in the Wits Law Faculty. Edwin was back in Oxford for the Bachelor of Civil Law but, in the midst of working towards winning the Vinerian Scholarship prize for the top student, had found time to finish 'Legal chauvinism, executive-mindedness and justice: LC Steyn's impact on South African law'.[12] In it, he delivered a devastating broadside at this venerated former Chief Justice of South Africa, a courageous intervention for a lawyer at the start of his career. It says something for Ellison Kahn, the long-time editor of the *South African Law Journal*, that he was prepared to publish it. It was not just the political and legal establishment outside whose hackles were raised. I remember distinctly one of the most senior members of the Law Faculty making snide comments about the paper in our common room.

Edwin made it clear that he was not arguing that Steyn acted at the behest of the apartheid regime: he was 'a man of formidable intellect and of autonomous conviction, who brought signal talents to bear in defending and implementing his legal notions'.[13] But, in Edwin's view, this made Steyn all the more dangerous: 'Had it been otherwise, his impact on this country's profoundest legal values would have been far less severe.'[14] The power of the article resides in large part in the way in which Edwin took Steyn's abilities as a jurist seriously. He charged Steyn with chauvinism both because he tried to purify the South African legal heritage of its English common law basis, reducing it to its Roman-Dutch elements, and because his judgments unwaveringly supported the racist policy agenda of the regime. And Edwin charged Steyn with executive-mindedness because he gave or joined in judgments which gave the executive a free hand when it came to dealing with what it considered to be threats to national security. But Steyn, Edwin suggested, was driven by his '*regsgevoel*' – his sense of justice – and he relied on sophisticated legal reasoning to reach his conclusions.[15]

12 Cameron 'Legal chauvinism' (n 2).
13 Cameron 'Legal chauvinism' (n 2) 43.
14 Cameron 'Legal chauvinism' (n 2) 43.
15 Cameron 'Legal chauvinism' (n 2) 62.

Edwin mentioned Dworkin in only the third-last footnote of the paper, at the asterisk in its penultimate paragraph, which I quote in full because of its importance to my argument here:

> It may be, of course, that human freedom and dignity are not values in themselves or that their preservation from impairment is no especial responsibility of the lawyer or the judge. Again, it may be that the infringement of these concepts in the pursuit of a social policy of separation or purity or supremacy is justified in terms of some ultimate and empirically incognizable value, or in terms of some special definition of "freedom" and "dignity". The strictures on Steyn in the present paper have been built on the opposite assumption. Its inherent validity cannot be demonstrated here or ultimately perhaps at all. For the present it is enough to acknowledge the normative basis for some of the charges that have been levelled here at Steyn, and to point out that those who wish in refutation to establish his judicial virtues would have to adopt one of two approaches. They could show that the values underlying the criticisms contained in this paper are misconceived. Or they could grant them and show that L C Steyn was faithful to them. That cannot be thought an easy task.[16]

All the footnote says is: 'Anglo-American texts which explore and defend anew the kind of assumptions made here are John Rawls *A theory of justice* (1971) and Ronald Dworkin *Taking rights seriously* (revised ed 1978).'[17] But in 'LC Steyn in perspective', I pointed out that it was not just that Edwin's argument proceeded from liberal assumptions defended by Rawls and Dworkin.[18] It was also that his mode of analysis of how Steyn reasoned was implicitly Dworkinian. For Edwin rejected the idea, proposed by both legal positivists and realists, that judges have discretion in the decision of the kinds of 'hard cases' which he analysed. Rather, they are under an obligation to show why the law relevant to answering the legal question posed by the case in fact fully supports the answer they give. Ultimately at stake in such cases is not, however, something 'factual' in the sense that the answer can be derived from facts about the law. Judges will ultimately disagree on what theory shows the available facts in their best moral light, on what theory provides the most morally attractive account of the community of legal subjects whose lives are governed by the law of their land.

16 Cameron 'Legal chauvinism' (n 2) 74.
17 Cameron 'Legal chauvinism' (n 2) 74 fn 167.
18 Dyzenhaus 'LC Steyn' (n 2).

In my response, I tried to meet both challenges Edwin set for potential critics of his argument; the challenge in showing that his own values were misconceived and the challenge in granting these values and showing that Steyn was true to them. There is an obvious tension here. But I argued that Edwin's values could be granted in a way that showed that Steyn was true to them, albeit to a different conception of them, and that there was no way of choosing between the conceptions.

Edwin had counterposed to Steyn Oliver Schreiner, the liberal judge who would ordinarily have been made Chief Justice following the retirement of A v de Sandt Centlivres in 1957, had Steyn not been leapfrogged into the position. The first step in my argument relied on the great Marxist theorist Antonio Gramsci to suggest that Steyn and Schreiner were best understood as 'organic intellectuals', as working within their specialised juristic domain to uphold the interests of a social class.[19] Schreiner articulated in legal form the interests of the class of white, more or less liberal, English-speaking capitalists who had held power in South Africa for the first half of the twentieth century, while Steyn did the same for the emerging class of white nationalistic Afrikaners.[20]

The second step relied on Alisdair MacIntyre's *After virtue*, a hugely influential work at that time, to suggest that this clash between values could not be resolved using the resources of modern moral, that is, liberal philosophy.[21] I argued that Steyn no less than Schreiner was faithful to the values underlying Edwin's criticism, though to a conception animated by the dignity and freedom of the Afrikaner *volk*. It was not, then, that Edwin's values were 'misconceived' in being shown to be wrong, only that these liberal values were no more 'ultimate' than Steyn's and no less a 'special definition of "freedom" and "dignity"', as Edwin had put it.[22] Finally, I suggested that 'new notions, those of an increasingly powerful Black working class, [we]re developing to challenge both [the liberal and the Afrikaner] paradigms'.[23]

19 Dyzenhaus 'LC Steyn' (n 2) 388-389.
20 Dyzenhaus 'LC Steyn' (n 2) 389.
21 Dyzenhaus 'LC Steyn' (n 2) 389-391. See A MacIntyre *After virtue: A study in moral theory* (1981).
22 Cameron 'Legal chauvinism' (n 2) 74.
23 Dyzenhaus 'LC Steyn' (n 2) 393.

Two years later, I arrived in Oxford where I intended to develop my position into a doctoral thesis. I was hoping to work with Joseph Raz, the leading legal positivist philosopher of law. But the Law Faculty allocated me to Dworkin. For our first session, I presented him with a lengthy and I hoped more sophisticated version of my article in the *South African Law Journal*, a Marxist and positivist analysis of some judgments in which judges differed about how to interpret apartheid law. 'Very interesting', he said; as I came to learn, a deadly insult in the Oxford lexicon. 'But', he then asked, 'who do you think was right?'

That question changed the course of my thesis. In that moment I realised that I did think that judges who tried their best to uphold the values on which Edwin relied were 'right' and that 'their preservation from impairment' is a 'special responsibility of the lawyer or the judge'. But I had no idea of how to defend that position for two reasons. First, I encountered what I will call 'the moral problem', since, following MacIntyre, I still accepted that the values at stake were 'empirically incognizable', as Edwin had put it, that we lack the resources in modern moral philosophy to solve our deepest differences about the right and the good. Hence, the only solution was political. Second, because Steyn's judgments demonstrated both his 'formidable intellect' and the 'autonomous conviction' of a jurist, analysis of rival modes of legal reasoning in the hands of highly competent jurists would reveal not Dworkin's 'right answers', but that the judges are deeply divided in just the way the moral problem suggests. I will call this the 'legal problem'.

In my new book, I recount part of this anecdote and say that I hope with the book to have made progress towards answering Dworkin's question since 1988, the year I defended the thesis.[24] I will now set out the basic elements of my answer against the backdrop of Edwin's and my exchange and with the aid of some of his more jurisprudential writings over the years. In brief, it is that the legal problem can be resolved and its solution does go some distance to resolving the moral problem. However, the solution to the legal problem requires that human rights lawyers participate in the legal order and that creates a different problem, the 'legitimacy problem': human rights lawyers who use law to struggle

24 Dyzenhaus *Long arc of legality* (n 3) xiv.

against injustice cannot avoid contributing to the legitimacy of the regime responsible for the injustice.

2 MacIntyre, Finnis, Schmitt

MacIntyre adopted a Marxist critique of capitalism and the way it shaped our understanding of politics, the good life, and morality, which is what attracted me at that time. But I ignored important features of his work. I did not note that he also thought it was possible to construct a different kind of economic, political and moral order, informed by a deeply conservative ethics of virtue best articulated for him in the doctrines of the Catholic Church in which each individual has a given role and status within a well-defined and highly determinate system. In addition, I did not address his claim that this kind of society was not to be created by a political movement which would overthrow the existing order, whether peacefully through the mechanisms of democracy or by violent revolution. Nor would it be the case that the *telos* of such a community would be enforced by the state. Rather, taking as his example the existence of monasteries in the dark ages, in our own dark age, with the 'barbarians', as MacIntyre famously said on the last page of his book, already within our frontiers and 'governing us for quite some time',[25] the only viable political option is to build small communities of virtue whose practices would inspire both growth and emulation.

Using my terms above, MacIntyre argued that the moral problem could be solved by retreating to a premodern doctrine of virtue. However, the retreat does not require a solution to the legal problem since the state and its laws would not be involved in imposing this conservative and highly exclusionary conception of the good on others.[26] I see now that in weaponising MacIntyre's political theory so that it led to the legal problem, I had turned his political theory into something more akin to that of John Finnis, the Oxford philosopher of natural law and leading light of a right-wing tendency within Catholicism, which does seek to

25 MacIntyre (n 21) 244-245.

26 Of course, as examples of such communities in our own societies show, questions will arise whether the state, if it refrains from intervening in such communities, is reneging on its duty to protect the rights of women and children in them. The disputes in Canada about the renegade Mormon community in Bountiful, British Columbia, provide a rich example: see 'Winston Blackmore and James Oler found guilty of polygamy by B.C. judge' *CBC News* (24 July 2017).

harness existing state institutions in a bid to impose its *telos* on the whole society.

Consider the argument of Nathan Schlueter,[27] a Professor of Philosophy and Religion at Hillsdale College, a major bastion of right-wing thought in the United States. He distinguishes between 'Front Porch Republicans' on the one hand, 'who regard liberalism of any kind as inherently corrosive, and because liberalism is written into the genetic code of the American political order they are also critical of the American regime', and 'Natural Law Liberals' on the other, who 'distinguish between a positive form of classical liberalism that is continuous with the natural law tradition, and a form of modern liberalism that is not'.[28] To an outsider to these debates, this distinction may not amount to much since both groups share a view that society should be organised around a positive view of the common good, based on conservative Christian values, and regard secular liberalism as corrosive. The only difference, according to Schlueter, is that the Front Porch Republicans, whose philosophical inspiration is MacIntyre, think that liberalism of any sort is the enemy, whereas the Natural Law Liberals, whose philosophical inspiration is Finnis, claim to be the true heirs of the liberal tradition. Schlueter does, however, point to the distinction I mentioned a moment ago, namely, between the politics of incremental, voluntary community-building around a conservative Catholic *telos*, i.e. MacIntyre, and a state-imposed and -enforced ideology, i.e. Finnis.[29]

The two distinctions taken together are illuminating. Finnis's willingness to use state institutions to impose his view of the moral good goes hand in hand with an appropriation of the language of what we can think of as legal liberalism to further this end. If as a lawyer one is going to work within the institutions of state, it is important to be able to deploy the language of law and the rhetoric of the rule of law. And if, furthermore, one is working within a late-twentieth century liberal democratic state, one should also be able to present one's position as based on human rights.

27 N Schlueter 'A conservative conversation worth having: Alasdair MacIntyre and John Finnis on morality, politics and the common good' (2015) 44 *Perspectives on Political Science* 102.
28 Schlueter (n 27) 102-103.
29 Schlueter (n 27) 103.

However, it turns out that the rights are for those within a narrowly conceived community based on vague and troubling ethnic, cultural, and religious criteria, as well as a criterion pertaining to sexual identity.[30] While this claim may surprise some who think of Finnis as the leading exponent of natural law theory of the last 50 or so years, it is the only way to make sense of his consistent argument over an even longer period for a right-wing view of the political community whose 'common good' it is the task of the state to serve. Rights are for 'us' and not for 'them', an explicitly anti-cosmopolitan view of human rights, opposed, in Finnis's words, to a 'discourse in law schools and courts' which 'increasingly locates its participants in a universe of standards of correct thought and decision, and of the incorrect and unacceptable, which are generated and shared among persons who speak as if they were nowhere in particular'.[31] On this view, state law is the instrument to be used to impose on the whole political community, more accurately to create the political community of a nation in which each individual has a given role and status within a well-defined and highly determinate system. This instrumental use of law in the service of the imposition of a pre-modern conception of the *telos* of a society raises the legal question. For if such arguments are just as good legally speaking as the arguments on the other side, then the issues at stake are ultimately for some other form of inquiry, for example, for political theory, as I concluded in 1982.

As I have suggested, I have since 1984 rejected this conclusion, as do Finnis and his followers who have been busy during Brexit arguing for the constitutional legitimacy of an executive which acts free of legal and democratic constraints when fundamental constitutional questions must be resolved. The main vehicle for these arguments is the

30 Finnis has in the past argued for what he euphemistically calls a 'reversal of the inflow' of 'immigrant, non-citizen Muslims': J Finnis 'Endorsing discrimination between faiths: A case of extreme speech' in I Hare & J Weinstein (eds) *Extreme speech and democracy* (2009) 430 at 440. He has also opposed the right to same sex marriage on the basis that 'homosexual conduct' is immoral: J Finnis 'Law, morality, and "sexual orientation"' in J Corvino (ed) *Same sex: Debating the ethics, science, and culture of homosexuality* (1997) 31. His main protegé, Richard Ekins, has objected to the protection of the rights of those affected by the actions of the UK's armed forces: R Ekins, P Hennessey & J Marionneau 'Protecting those who serve' *Policy Exchange* (28 June 2019).

31 J Finnis 'Judicial power: Past, present and future' *Policy Exchange* (20 October 2015) 26-27.

website of the 'Judicial Power Project',[32] which was originally set up to oppose judicial review on the human rights basis required by the UK's ratification of the European Convention on Human Rights and the subsequent incorporation of the rights through the Human Rights Act, 1998. When the political turmoil around Brexit started to raise issues of high constitutional law, it became the vehicle for the 'Leave' views of Finnis and Richard Ekins, also an Oxford Law Professor.

Their main claim is that judicial review undermines parliamentary sovereignty, a claim which became especially strained when they argued that parliamentary sovereignty was undermined when parliament sought to control Theresa May's and Boris Johnson's attempts to exit the European Union without parliamentary sanction.[33] My claim here is not that the cases were easy – that lawyers could not reasonably disagree about the correct answer. Rather, it is that the legal arguments Finnis, Ekins and those allied with them made were *faux* legal arguments in that they were designed to undermine legality in order to preserve a certain view of British society as a kind of 'distinct society', a term of Finnis that I will come back to in a moment.

Consider that in the aftermath of the *Miller* decisions,[34] Finnis and his followers have argued that it is consistent with the rule of law for the UK Parliament to break the rule of law, so leaving the executive free of the obligations the same government had negotiated in an international treaty.[35] This risible argument is premised on the view that international law is not really law, 'defective' as Finnis has proclaimed.[36] It is risible because no jurist should take seriously the claim that government ministers and parliament are legally authorised to violate the rule of law simply because they have the power to do so.[37]

32 https://judicialpowerproject.org.uk.
33 See eg R Ekins 'Brexit and judicial power' *Policy Exchange* (21 July 2016).
34 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v Prime Minister* [2019] UKSC 41.
35 For an early version of this argument, see R Ekins & G Verdirame 'The Ministerial Code and the rule of law' *UK Constitutional Law Association blog* (6 November 2015).
36 J Finnis 'Ministers, international law, and the rule of law' *Judicial Power Project blog* (2 November 2015).
37 See D Akande & E Bjorge 'The United Kingdom Ministerial Code and international law: A response to Richard Ekins and Guglielmo Verdirame' *EJIL:Talk* (11 December 2015).

The arguments of these lawyers in what Thomas Poole has aptly dubbed the 'Executive Power Project'[38] seem designed to set the UK on a path which leads to the undermining of both the rule of law and democracy. We can note here Ekins's astonishing claim that the judges of the UK Supreme Court who used reasoning long familiar to common lawyers to read a privative clause as not ousting all judicial review should be removed from office, a step which he asserted would not compromise judicial independence.[39] In making this argument, he advocated the kind of tactic so successfully deployed in Orbàn's Hungary and in Poland over the last few years of using mechanisms of judicial discipline to ensure a compliant judiciary at the same time as maintaining a façade of the rule of law.

Elsewhere I have pointed out that the arguments deploy a 'Schmittean logic'.[40] This is not a logic which requires one to have read Carl Schmitt and his polemics during the last years of the Weimar Republic in his debate with Hans Kelsen about who was the 'guardian' of the Weimar Constitution.[41] Rather it is the logic of the kind of 'legal' argument deployed when jurists want to reach the conclusion that the executive is the 'guardian of the constitution' in matters in which existential questions about the identity of the political community arise as legal questions. Only if the executive is freed up in this way can it make the distinction between friend and enemy that will establish the kind of substantive homogeneity on which, to use the phrase above, a 'distinct society' can flourish. That phrase is taken from the following passage from Finnis's essay in the 1970s in which he supported the conclusion reached by the Rhodesian High Court when it upheld the legality of the racist regime established by Ian Smith's Unilateral Declaration of Independence:[42]

> As soon as the Rhodesian judges had decided that Rhodesia was, as a matter of "fact", a distinct society with its own accepted power structure and intelligible

38 T Poole 'The executive power project' *London Review of Books blog* (2 April 2019).
39 R Ekins 'Do our Supreme Court judges have too much power?' *The Spectator* (14 May 2019).
40 Dyzenhaus 'Lawyer for the strongman' (n 4).
41 See L Vinx *The guardian of the constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law* (2015).
42 *Madzimbamuto v Lardner-Burke* 1968 (2) SA 284 (RA), discussed in J Finnis 'Revolutions and continuity of law', first published in AWB Simpson (ed) *Oxford essays in jurisprudence* (1973) 44 and reprinted in J Finnis *Philosophy of law: Collected essays, vol IV* (2011) 407. My citations are to the 2011 version.

> commonweal, not merely a fragment of imperial power and commonweal, their decision (if not their reasoning) became almost inevitable. The reason for this inevitability was expressed by lawyers of Edward IV: "it is necessary that the realm should have a king under whose authority laws should be held and upheld". It is indeed possible to speak of a legal system growing, flourishing, and withering away – but only if one considers it as something importantly more than a set of rules, however profoundly analysed.[43]

This 'distinct society' was that of the white minority who 'accepted' the oppressive 'power structure' because it was 'intelligible' to them as serving their economic and caste interests. The 'king' whose 'authority' was 'necessary' in order that 'laws should be held and upheld' was the executive headed by Smith which had ruptured the old legal order because it restrained their supremacist view of the order of things, in much the same way as the first apartheid government sought to rid the presence of 'coloureds' from the common voters roll because it disturbed their vision of racial purity.

There is a direct line from this work of the 1970s to an essay in 2009, a polemic against Hart's political philosophy. Finnis's main objection is that Hart had

> little indeed to say about the inter-relations of common good, justice and liberty in a nation whose liberty-minded citizens have largely given up procreating – or rather, bearing – children at a rate consistent with their community's medium-term survival, and whose law, considered in its much-obscured implications, marks out for them a path towards, first the loss of national self-determination; and then their own replacement, as a people, by other peoples, more or less regardless of the incomers' compatibility of psychology, culture, religion or political ideas and ambitions, or the worth or viciousness of those ideas and ambitions; and finally to the ruinous loss of most or much that Hart worked for, or took for granted, as precious.[44]

43 Finnis (n 42) 429 (citation and paragraph break omitted).

44 J Finnis 'HLA Hart: A twentieth-century Oxford political philosopher' (2009) 54 *American Journal of Jurisprudence* 161 at 184. Finnis expresses his allegiance, here as elsewhere, to the political theory of Eric Voegelin, an unrepentant racist and fascist, whose legal theory owed much to Carl Schmitt: see D Dyzenhaus 'Democracy or apocalypse' *Aeon* (20 September 2022). For my critique of the similar phenomenon in the United States, exemplified in explicit fealty to Schmitt in the work of the Harvard law professor Adrian Vermeule, see again 'Schmitten in the USA' (n 4).

What is astonishing here is that Finnis commits himself in this passage to a version of the 'Great Replacement Theory', later a trope of the extreme right in the United States.

This understanding of law as the instrument of the common good explains what is wrong legally speaking with the legal reasoning one finds in Steyn, Finnis, and Schmitt. It is, as I claimed above, *faux* legal reasoning. While it respects the formal strictures of such reasoning, and may do so in a way which, as Edwin described Steyn, brings 'signal talents to bear in defending and implementing … [their] legal notions',[45] the aim is to undermine legality. Put differently, while formally the reasoning may seem impeccable, substantively it is risible because its aim is to undermine legality. As Hermann Heller, one of the leading public law and legal theorists of Weimar-era Germany pointed out in his 1927 book on sovereignty, Schmittean logic is born of a wish to replace legal theory with a 'political theology' in which the executive is endowed with magical powers.[46] It results in a theory which Heller called 'organ sovereignty', according to which the will of the executive is made the source of law on the most important constitutional issues.[47]

My claim does presuppose that there is a substance of legality at stake so that the legal problem does not turn into the moral problem. As Heller also explained, a commitment to legality goes beyond positive or enacted law. It includes a commitment to governing in accordance with fundamental principles of law intrinsic to legal order, both the formal and procedural principles which will appear on almost every list of such principles and the principle of equality before the law of all those subject to its power.[48] And as I have argued in my own work, following the lead of another of my Jurisprudence teachers, Etienne Mureinik, a commitment to legality in this substantive sense gives rise to a 'culture of justification'.[49] It requires that when a legal subject challenges an exercise of state power, the responsible official must be able to give an answer to the question: 'But, how can that be law for me?' As I will now argue,

45 See text at n 13.
46 H Heller *Sovereignty: A contribution to the theory of public and international law* (D Dyzenhaus ed, B Cooper trans, 2019) 101-104.
47 Heller (n 46) 103-104.
48 See D Dyzenhaus 'Introduction: The politics of sovereignty' in Heller (n 46) 1 at 42-54.
49 E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

as long as a state is on the continuum of legality, such an answer can be given.

3 State types

In his paper, Finnis not only failed to mention the political context in which the High Court gave its decision, but also the one strong dissent by Justice Fieldsend in which the judge reasoned that the court had a 'lasting duty' to uphold the Constitution.[50] 'If', he said, 'as in South Africa, the courts were obliged to stand resolutely in the way of what might be termed a legitimate attempt to override the constitution, *a fortiori* must a court stand in the way of a blatantly illegal attempt to tear up a constitution'.[51] Fieldsend's 'what might be termed' expressed his scepticism about the legality of the three attempts by the South African government in the 1950s to use legislation as a blunt instrument to circumvent the entrenched right of these few mixed-race members of the otherwise all-white electorate.

Section 152 of the South Africa Act, 1909, required that certain of its provisions could be changed only by a two-thirds vote of both houses of the South African Parliament – the House of Assembly and the Senate – sitting together. One such provision was section 35, which protected the right to vote of all those entitled to vote under 'laws existing in the Colony of the Cape of Good Hope at the establishment of the Union' and precluded their disqualification from being registered as voters 'by reason of … race or colour only' unless the special procedure was followed. The apartheid government did not at that time have the required majority, so it enacted the statute abolishing the right by simple majorities at separate sittings, i.e. the procedure for enacting an ordinary statute. The Appellate Division, the apex court of the time, unanimously resisted that attempt, as it did the second, which used the device of setting up a parliamentary committee as the final 'court' when the validity of a statute was in issue.[52]

The majority relied on rather formal reasoning to get to this conclusion. In contrast, in his concurring judgment, Justice Schreiner relied on substance, stating that, in his view, an 'entirely sufficient and

50 *Madzimbamuto* (n 42) 430.
51 *Madzimbamuto* (n 42) 430.
52 *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

convincing reason ... for holding that the High Court of Parliament Act is invalid' was that 'implicit' in the Constitution was 'a protective judicial system ... with the Appellate Division set up at the apex'.[53] The willingness to rely on substance enabled him to issue the lone dissent when it came to the third attempt, which enlarged the upper house of parliament in order to give the government the majority it needed to override the entrenched provision. In response to the government's argument that purpose was irrelevant to assessing the validity of statute that had complied with the legal order's formal criteria, he reasoned that if in issue is a 'legislative plan to do indirectly what the legislature has no power to do directly ... the purpose may be crucial to validity'.[54]

In *Justice: A personal account*, Edwin paraphrases Schreiner thus: 'the court's job was to assess not how well the conjuror concealed the trick, but whether there *was* a trick', that is, a 'fraud'.[55] In other words, the majority of the court connived at an exercise in *faux* legality. Edwin concludes that 'Schreiner's stand left a moral and political legacy':[56]

> It laid a paving stone that would eventually open a path to a constitutional future. The appeal court's decisions striking down apartheid legislation, and [Schreiner's] dissent ..., showed what principled judges might achieve if they remain true to legal values. They can provide a bulwark for legal rights and civil liberties, even when powerful lawmakers try to undercut them.[57]

As I have explained elsewhere, this gave the modern legal state that ruled South Africa a particular form – that of the 'apartheid state' – a perverse variant of a 'rule-of-law state'.[58] In the latter, all official action is subject to law, the officials are answerable for their actions before judicial institutions, and the law to which they are answerable includes both the positive law that authorises their actions and legal principles embedded in the law that are protective of individual rights.

In contrast, while all inhabitants of apartheid South Africa were subject to the same general law, the racial laws of apartheid carved out vast exceptions to the rule of general law by creating the legal regimes which dominated the lives of the majority population of black South

53 *Harris (No 2)* (n 52) 788-789.
54 *Collins v Minister of the Interior* 1957 (1) SA 552 (A) 575.
55 E Cameron *Justice: A personal account* (2014) 19-20 (emphasis in original).
56 Cameron *Justice* (n 55) 20.
57 Cameron *Justice* (n 55) 20.
58 Dyzenhaus *Long arc of legality* (n 3) ch 5.

Africans, subjecting them to severe discrimination. These regimes were for the most part run by specialised agencies and officials and they relegated black South Africans to an inferior status in almost all aspects of life. Nevertheless, the ideal that all South Africans were equal before the law – the specifically legal ideal of human dignity – was maintained as an abstract ideal of the legal order throughout the apartheid era, even as particular apartheid laws made it ever clearer that the animating political ideology of the ruling party was one of white supremacy.

Only a minority of the judges were determined to remain true in this way, and these judges were generally in the lower courts so were often overruled on appeal. In addition, the parliament was astute to react by closing what the government saw as a gap in the legislation and by ensuring that new legislation did not provide similar opportunities. To achieve that end, the parliament had to be either explicit in its legislation that certain groups of people were not to be treated as free and equal or to prohibit in very explicit statutory provisions judicial review of the implementation of those decisions. These strategies, often combined, had the effect of putting those affected beyond the reach of the rule of law. They were governed not by law, but by the diktat of the officials who staffed the particular legal regimes, which threatened to turn the apartheid state into one of two other types of state.

To the extent that South Africans found themselves governed by legally unconstrained executive prerogative, the apartheid state at times verged on becoming a 'dual state', the term coined by Ernst Fraenkel to describe the Nazi state, which he said consisted of two states that existed side by side: the 'normative state', which contained whatever remained of the law and institutions of the 1919–1933 Weimar legal order, together with the statutory regimes enacted after 1933 and implemented through those institutions; and the 'prerogative State', which consisted of the apparatus of the Nazi Party wherein the leader's will was the ultimate source of decision-making authority.[59] Fraenkel observed that the law of the normative state governed relationships between individuals, and between individuals and state institutions, only as long as an official in the prerogative state did not consider it in the interests of the Nazi Party to override that law. He concluded that the rule of law did not obtain

59 E Fraenkel *The dual state: A contribution to the theory of dictatorship* rev ed (2017).

in Nazi Germany because the protections of the normative state were subject to the discretion of Nazi officials.

In contrast, to the extent that the majority of South Africans lived in a space that was controlled by law, but a very different regime of law from that which governed the minority white population, the apartheid state verged on becoming a 'parallel state', a prominent example of which is the state that governs both Palestinians in the Occupied Territories and the inhabitants of Israel. The Israeli Supreme Court is the apex court for both legal orders. But within this unified legal order a fairly clear distinction is maintained between the two sub-orders. On the one hand, within the Israeli legal order (ILO), the supreme legislative authority is parliament, the Knesset, which legislates subject to the regime of constitutional law developed out of Israel's Basic Laws by the Supreme Court. On the other hand, within the legal order of the Occupied Territories (OTLO), the supreme legislature is the military which legislates subject to the regime of law developed by the same Court and the Knesset for that order. But to a large extent the two legal orders are sealed off from each other.

These states, at least in their ideal typical forms, illuminate what I call the 'continuum of legality', the continuum on which states can be placed according to the extent they live up to the ideal of the rule of law. All states that are on the continuum establish a 'jural community', a community of legal subjects who are formally equal before the law. For reasons I will now explore, the rule-of-law state is at one end of the continuum and the apartheid state further to the other end, the parallel state yet further. The dual state, however, falls off altogether because it does not comply with the rule of law even minimally and as such does not constitute a jural community. And as we will see, the potential for human rights lawyering varies depending on where a state falls on the continuum.

4 The continuum of legality

One could not be a human rights lawyer in Nazi Germany. Fraenkel based his book *The dual state* on his experience of legal practice in Berlin between 1933 and 1938. From what is known about the detail of Fraenkel's legal victories, they did not depend on any residual legal rights available within the normative state. Rather, they depended entirely on the effective use of legal procedures to his clients' advantage in cases in which judges were not subject to direct pressure from officials in the prerogative state or were prepared to try to resist such pressure

and do their jobs.[60] This was all that was possible because the 'always cramped' space of the normative state contracted as the Nazi grip on power increased until the point when 'the normative state meant not the rule of law but the technical administration of the law'.[61] In addition, as we have seen, even that technical administration could be set aside if an official in the prerogative state so decided. Because, in other words, the situation was one of interaction between a legal space and a space of no-law, the possibilities for legal challenges to exercises of power were not only severely limited but also entirely precarious. In a context in which a legal space interacts with a space of no-law, human rights lawyering cannot even get off the ground.

In contrast, in the apartheid state human rights lawyering was possible because the mark of such a state is that all are subject to same law except in so far as particular enactments carve out areas in which certain groups are subject to a discriminatory regime. Individuals in these groups are thereby relegated to the status of second-class citizenship. The idea of second-class citizenship does not here pertain to one's political standing in the sense that one is a citizen of, for example, Canada. Rather, it pertains to one's juridical standing, one's standing before the law. The second-class citizen has one foot in the space of first-class citizenship or full status before the law, with the other in a space of law-created inferior status. Such second-class status is much more *legally* problematic than the status of slavery, so long as the enslaved persons are relentlessly consigned to the status of objects or things. For if one is legally recognised as having status as a legal subject for some purposes but not for others, the parts of the law which seem to relegate one to inferior status are put into question by those parts which do not when a legal challenge is mounted to the inferior status.

On the one hand, the answers may enhance the subjects' status, in which case the order becomes more rule-of-law like. On the other, the answers may diminish status to the point where the inferior status of the group is so entrenched that individuals in it are no longer second-class citizens because they are governed by an entirely different regime of law,

60 DG Morris 'The dual state reframed: Ernst Fraenkel's political clients and his theory of the Nazi legal system' (2013) 58 *Leo Baeck Institute Year Book* 5.

61 Morris (n 60) 17, 19. See also DG Morris *Legal sabotage: Ernst Fraenkel in Hitler's Germany* (2020).

as in the parallel state. Within that state, human rights lawyering is both possible and practiced, though quite differently depending on whether the lawyers litigate within the ILO or the OTLO.

The fiat which brought the Palestinian and Israeli orders together, thus creating a parallel state, was effected by Meir Shamgar, who had held the office of attorney general during the initial period of occupation and had in that role designed the system of military law which governed the occupation. It unified the two legal orders by making the Israeli Supreme Court the apex court for both legal orders. But within this unified legal order a fairly clear distinction is maintained between the two sub-orders, except in so far as the court applies principles of Israeli administrative law in light of its perception of appropriate application in the context of military occupation, which is in line with Shamgar's official reason for this fiat; that it was important that there was some form of external control over the military so as to prevent arbitrariness and maintain the rule of law.[62] The court, while curbing some kinds of arbitrariness, in general defers to the military's say-so in security matters when it came to the facts and to the controls which are considered appropriate to apply. Hence, in this parallel state, the law which governs the lives of Palestinians in the OTLO is not an exception to the general law of the ILO, but the system of law developed by the military under the supervision of the Supreme Court.[63]

This parallel state is thus unlike the apartheid state because it is not held together by fundamental legal principles. But within it, the OTLO is not a prerogative state in which individuals are subject to the totally arbitrary will of those with power over them. The officials of the system may not disobey the standing commands or orders of the military authorities. Further, there is even less arbitrariness because of the Israeli Supreme Court's jurisdiction. More procedural protections

62 I say 'fairly clear' because it appears that recently the Supreme Court has started to rely more on constitutional law than on public international law in its rulings on Palestinians in the OTLO: see T Hostovsky Brandes 'The diminishing status of international law in the decisions of the Israeli Supreme Court concerning the Occupied Territories' (2020) 18 *International Journal of Constitutional Law* 767. She argues that this shift is consistent with a deliberate eradication of the distinction between Israel and the Occupied Territories by the Knesset and the government.

63 The military is of course also subject to parliamentary legislation which in some cases orders the military commander to legislate in particular ways. Note that appeals can be made from the OTLO to the Israeli administrative courts.

have been put in place than the military authorities thought appropriate. Occasionally, the court finds that public international law is relevant to its deliberations. Further, there have been some decisions, especially those brokered between lawyers in the shadow of the court, which have made a substantive difference.[64]

The tensions in issue here arise because that court presides at the same time over the Israeli state, a rule-of-law state, which it has had a prominent role in designing. Within the OTLO, Palestinians are neither quite second- nor quite first-class citizens. To be a second-class citizen, there has to be a group of first-class citizens in whose status the second-class citizens to some extent partake and the inhabitants of the OTLO are not subject to the fundamental principles which lie at the basis of the ILO. They are also not quite first-class citizens within the OTLO because while all the subjects of the OTLO are equally subject to the law, the law they are subject to is the commands of those who occupy their land by force. To be a first class-citizen is to be treated with dignity as a responsible agent and within the OTLO that ideal is reduced to what Joseph Raz describes as the guidance function of law; the law just tells people what they must do.[65] This is not nothing. To the extent that the law is not arbitrarily enforced, Palestinians can plan their lives, which, as Raz concedes, does provide for some measure of freedom and dignity, and indeed without which there can be neither freedom nor dignity.[66]

That there is some measure of freedom and dignity is, of course, important. It shows that even as law oppresses, it has to enable something of moral worth.

The discussion so far is highly idealised. Closer to the ground, as already intimated, things may look very different. For example, law can be used to construct a space of no-law, a legal void or 'black hole', as Lord Steyn described the situation of detainees at the US base of Guantanamo.[67] In such a space, it may seem that prerogative or legally

64 D Kretzmer *The occupation of justice: The Supreme Court of Israel and the Occupied Territories* (2002) 187-198.

65 J Raz 'The rule of law and its virtue' in *The authority of law: Essays on law and morality* (1979) 210 at 213-214.

66 Raz (n 65) 219-223.

67 J Steyn 'Guantanamo Bay: The legal black hole' (2004) 53 *International and Comparative Law Quarterly* 1.

unmediated power rules. But the fact that the space of apparent no-law is still bounded by law can make a difference. Consider two quick examples.

First, in the case that led Ekins to propose disciplining judges, the UK Supreme Court decided by a slim majority of 4 to 3 that an 'ouster clause' in a statute – i.e. a provision that purports to exclude from challenge or appeal any decision of the tribunal established by that statute – does not prevent a judicial review challenge based on an error of law.[68] The majority commented that there was a 'strong case' for finding that the rule of law requires that the courts should decide the extent to which to uphold a clause laid down by parliament that purports to exclude the availability of judicial review by the High Court.[69]

Second, recall that I said that second-class status is much more *legally* problematic than the status of slavery, so long as the enslaved persons are relentlessly consigned to the status of objects or things. The development of the Roman law of slavery is an example here, as when enslaved persons assumed tasks on behalf of their masters, for example, entering into contracts, it became difficult to maintain them in the class of things without any subjective rights. In addition, the possibility of manumission – the emergence of an enslaved person by dint of an act of the owner from no-status to full status – made it more difficult to hold intact the category of no-status.[70] A slave-owning society is like a dual state in that enslaved persons live in a space where prerogative rules, but private individuals wield the prerogative, not state officials. Moreover, it is a prerogative granted by law and so subject to legal regulation or abolition. The relationship between the space of legality and the space of private prerogative is thus bounded by law in a way which over time may constrict the prerogative space, the opposite of what we find in the dual state, and more akin to the situation of the apartheid state.

Indeed, it may be the case that all states on the continuum of legality turn out to be hybrid in that they are at least to some extent rule-of-law states, otherwise they would have no place on the continuum of legality. But to some extent some subjects will be second-class citizens and to that extent the state will be an apartheid state. In addition, it is likely that to some extent a state will try to prevent general principles reaching

68 *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.
69 *Privacy International* (n 68) para 144.
70 See A Watson *Roman slave law* (1987).

from one legal space to another and will to that extent be a parallel state; or will, whether deliberately or unwittingly, attempt to create spaces in which prerogative rules and to that extent be a dual state.

Consider in this regard that there is a way in which Palestinian subjects in this parallel state are virtual second-class citizens in the legal sense sketched above, and which complicates my argument. The Israeli Supreme Court presides over a state – the ILO – in which there are first-class citizens, although the Palestinian citizens of Israel are in significant respects second-class citizens.[71] Within the Occupied Territories, while Palestinians are all subject to the same law, it is also the case that they live side by side with the Israeli settlers in the fortified enclaves which are illegal extensions of the Israeli state and subject to the protection of that state. Dramatic examples here are the separate systems of roads established by the Israeli Defence Force for settlers and Palestinians, the wall built to cut Palestinians off from contact with Israel and settler enclaves, as well in many cases from their means of livelihood.[72] Palestinians in the Occupied Territories are, that is, virtual second-class citizens because they live under an occupation which provides full status for settlers and an inferior status for them while the Supreme Court's jurisdiction over them gives them a toehold if not a foothold in the first-class space. But even that toehold is at best precarious since the Court both offers and withdraws the protections of legality. It gives them procedural rights to contest official action, but at the same time narrows dramatically the substantive resources available for that contest.

I venture that wherever human rights lawyering is possible, the lawyers confront the problem of hybridity, that all states on the continuum of legality have elements of all the ideal types. That of course complicates their lawyering immensely from the legal point of view. But it also is complicated because of what I termed earlier the legitimacy problem. Human rights lawyers who use law to struggle against injustice cannot

71 See H Jabareen 'Hobbesian citizenship: How the Palestinians became a minority in Israel' in W Kymlicka & E Pföstl (eds) *Multiculturalism and minority rights in the Arab World* (2014) 189.

72 See J Dugard & J Reynolds 'Apartheid, international law, and the Occupied Palestinian Territory' (2013) 24 *European Journal of International Law* 867; H Jabareen 'How the law of return creates one legal order in Palestine' (2020) 21 *Theoretical Inquiries in Law* 459.

avoid contributing to the legitimacy of the regime responsible for the injustice.

5 Legitimacy and human rights lawyering

In *The occupation of justice*, a pioneering study of the legal regime created by Israel's occupation, David Kretzmer comments that it is 'fair to assume ... that a further reason [for creating the parallel state] could well have been that petitions to the Supreme Court of Israel by residents of the Occupied Territories would imply the recognition of Israel by the petitioners, as well as political legitimization of Israeli rule over the Territories'.[73] Whether or not this reason motivated Shamgar, the implication is built into the structure of the parallel state and its instantiation in this context. But, I would argue, that implication is built into the structure of every state on the legality continuum.

As Michael Sfard argues in his book on practicing human rights law in the Occupied Territories, regime change cannot be an aim of human rights lawyers because they accept the limits the law imposes on their practice.[74] Not only do their losses in court help to shore up the legitimacy of the regime, but also their occasional victories, because the latter support the authorities' claim to be ruling in accordance with the rule of law. That fact has made Sfard and others wonder whether they should discontinue their practice because overall the calculus is that they do more harm than good. But they find themselves unable to give up because the victims of the oppressive regime turn to them for help.

There is another reason for continuing. The experience of human rights lawyers during apartheid looms large in Sfard's understanding.[75] On the last page of his book, he asserts that 'one day the occupation will end, like apartheid in South Africa' and when it does 'we'll find that we are not entirely bereft of a culture of good government, that we do have moral foundations to draw on'.[76] That provides the reason why 'human

73 Kretzmer (n 64) 19-20.
74 M Sfard *The wall and the gate: Israel, Palestine, and the legal battle for human rights* (2018) especially his 'Conclusion' at 425ff.
75 Sfard (n 74) 443-444, 447-448.
76 Sfard (n 74) 455.

rights lawyers must hold their heads high and know that they have a role in the appearance of cracks in the occupation'.[77]

Sfard does not note that just such a culture of good government was the basis for constitutionalism in post-apartheid South Africa and has proved of the utmost importance at a time when trust in government is low, because of widespread corruption and incompetence which has infected all levels during a decade of 'state capture'. The human rights lawyers of the apartheid era maintained the idea that the law embodied an ideal of the unity of the people which transcended the political divisions of the day, and which was worth struggling for against the odds. It is significant that the roots of such struggle go back to the turn of the last century, to the commitment to an ideal of constitutionalism which profoundly informed the practice of the founders of South Africa's main liberation movement, the African National Congress (ANC).[78]

Without the example of a few cases in which the judges upheld fundamental principles of legality, there would have been no basis for these lawyers' practice. The ideal of the rule or law – of the equality of all in the jural community before the law – for which they strove does not aim to reflect all the brute facts about the world. It is a regulative assumption, one made to shape the world by engaging in a practice that builds on some actual elements in order to make the world live up to the ideal.

There is an element of choice in making the assumption, as there is in the decision to be a human rights lawyer in an unjust regime. Here we should recall that in the early 1960s the leaders of the ANC, most notably Nelson Mandela, turned to armed struggle because they regarded the legal space for oppositional politics as too severely constricted by the apartheid regime, a turn which reflected similar decisions made by other political leaders in the course of the struggle for self-determination in the post-war period. However, at least in the case of the ANC, the ideal of constitutionalism and the rule of law continued to animate their activity, as it did the activity of those who chose to continue the struggle within

77 Sfard (n 74) 455.

78 See D Dyzenhaus 'The African National Congress and the birth of constitutionalism' (2020) 18 *International Journal of Constitutional Law* 284, reviewing T Ngcukaitobi *The land is ours: South Africa's first black lawyers and the birth of constitutionalism* (2018) and B Ngqulunga *The man who founded the ANC: A biography of Pixley ka Isaka Seme* (2017).

the space afforded by the fact that South Africa remained for the most part an apartheid state, a perverse variant of a rule-of-law state. As Edwin has put the point:

> The history of apartheid under law therefore reflects a paradox: for law to be effective in enforcing an evil or unjust system, its claim to be at least partially just or to possess at least a partial internal logic of justice must be true. It is precisely the element of legal containment of apartheid, and challenges to its extremities, that kept legal values alive in South Africa. And it is precisely this ambiguous history that laid the foundation for our present constitutional order.[79]

He has also pointed out that South Africans should not call the present legal system 'a charade or a fiction' because of the injustices that remain or which have been created since the endof formal apartheid:

> The point is not that our present system of law is, like apartheid law, illegitimate, but that even a legitimate system of law, grounded in popular will, like ours, can continue to license injustice. To caricature the past risks giving us an unearned free pass into this present.[80]

It is, that is, all too easy to regard the problem of legalised injustice as one which dwells in other often distant times or places: the Nazi state, the antebellum US with its laws permitting slavery and the racist law of the apartheid legal order. But the example of the last helps to show that the commitment to governing legally, that is, in accordance with fundamental principles of legality, can bring certain kinds of injustice to the surface as problems which the legal order needs to solve in order to maintain itself in good shape. The problem of legalised injustice is a permanent problem for us, whoever we are, in that injustice is often hard to see, especially by those who are its beneficiaries or at least not its immediate victims, and even sometimes by the victims themselves. If there were no human rights lawyers, these injustices would remain buried. However, their work brings to bear the legitimacy problem, which can never be made to disappear. And that's a good thing. It alerts us to the fact that the moral problem remains a permanent feature of our societies.

Both injustice and disagreement about it are part of the politics of the jural communities that came into being with the creation of the modern legal state. The legal orders of such states as well as the

79 Cameron 'Submission on the role of the judiciary' (n 1) 437.
80 E Cameron 'Fidelity and betrayal under law' (2016) 16 Ox*ford University Commonwealth Law Journal* 346 at 356.

international legal order, which makes it possible for states to interact with each other as formally equal before the law, provide sites where the moral problem can be raised and provisional solutions offered. The solutions are at best provisional because they are always subject to being revisited and re-evaluated in the light of our experience. Because legal order makes possible both the production of compulsory legal norms and their change, and also enables reform of mechanisms of production and change, it is a kind of tribunal of experience, a laboratory, we might say, for working out which norms should be regarded as the compulsory norms of a society.

In this light, one need not accept, as I did in 1982, that the values on which Edwin relied were 'empirically incognizable', that we lack the resources in modern moral philosophy to solve our deepest differences about the right and the good and that, hence, the only solution was, and is, political. Rather, relying on the philosophical tradition of pragmatism, I can argue that the political experience of life under an order of public law affords us the ground for confidence in these values. In addition, one need not accept, as I did, that because Steyn's judgments demonstrated both his 'formidable intellect' and the 'autonomous conviction' of a jurist, analysis of rival modes of legal reasoning in the hands of highly competent jurists would reveal not Dworkin's 'right answers', but that the judges are deeply divided in just the way the moral problem suggests. For the 'legal problem' arises only if we fail to see that the arguments deployed by the *faux* jurists of the past and the present are just that; arguments designed to undermine the very commitment to legality which makes legal order into the tribunal of experience. In sum, Edwin not only won that debate, but his arguments also have much salience in our contemporary situation.