The Difference Law Makes Review Article of Abel, Politics By Other Means and Lobban, White Man's Justice

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REVIEW ARTICLE

The Difference Law Makes

*David Dyzenhaus**

Richard Abel, Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994, New York: Routledge, 1995, xxi + 644 pp, pb £19.95.

Michael Lobban, White Man's Justice: South African Political Trials in the Black Consciousness Era, Oxford: Clarendon Press, 1996, ix + 288 pp, pb £14.95.¹

'The struggle against apartheid is one of the great contemporary moral dramas', says Richard Abel on the first page of *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994*. His account of that struggle focuses on the double role of law in it — law as the sword of the oppressor and law as the shield for the oppressed. Similarly, in *White Man's Justice: South African Political Trials in the Black Consciousness Era*, Michael Lobban offers an account of the role law played in judicial characterisations of resistance to apartheid when the resisters had been brought to court charged with various crimes against the state.

There is a lot of common ground between Abel and Lobban. Both assume that the central question of jurisprudence is the relationship between law and politics — more precisely, the question of how law necessarily constrains politics. They think, furthermore, that apartheid South Africa should be fertile ground for an investigation of the relationship between law and politics. This is a compelling assumption because apartheid South Africa presented such a striking example of a 'wicked legal system'. It was a legal order which had all the basic institutions familiar to lawyers in Western democracies and it functioned in much the same way as their own legal orders. However, it had also been made the instrument of a racist regime who used it not only to legislate its ideology into law but also to outlaw in draconian ways most organised opposition to apartheid. In sum, the apartheid legal order should tell us much about the ability or inability of law to constrain politics.

In addition, both Abel and Lobban move beyond a traditional narrow focus on legal reasoning to a broader perspective. Their perspective is broader, first, because it investigates the social and political context which can tell us how challenges to the powerful become legal challenges. Secondly, it looks to the role that law plays in structuring the perceptions and conduct of all legal actors — of those subject to the law, of the lawyers who are responsible for channelling their challenges to authority or for defending them in court, of the officials who claim the law's authority for their actions, as well as the perceptions and conduct of judges and magistrates charged with interpretation and application of the law. Thirdly, they investigate the question of the interaction of law and fact when the issue is not only

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1 All page references in the text are to these books.

the application of law to particular fact situations but also the very understanding of the facts.

Despite this common ground, the two studies come to very different conclusions about the relationship between law and politics. For Abel, his inquiry into the struggle of South African lawyers and litigants against apartheid 'redeems law's promise by reminding us of its potential nobility' (p xv). In contrast, Lobban is almost relentlessly pessimistic. In his view, his case studies of political trials during the 1970s demonstrate that the law cannot prevent judges who are basically committed to the dominant political ideology from moulding the requirements of the law to suit the outcome desired by the state. Time and again, as he shows, judges went out of their way to distort the requirements of the criminal law and of the law of evidence in order to find the accused guilty of illegal opposition to the state.

Lobban acknowledges that his pessimism about the law is conditioned by the particular context of the trials he investigated. The 1970s were a time of 'united white political sentiment', one in which the 'ideology of apartheid had reached its greatest domination of white politics'. Moreover, the trials for the most part 'involved white men judging the aspirations of black youths', judgments inevitably prey to the political prejudices of the time (pp 260–61).

The context of the 1980s which Abel investigates in his book was, then, intrinsically more favourable to optimism about the law. During that time, the ideology of apartheid fractured; internal opposition was able to organise on a large scale; and white lawyers, some of whom had been targeted as student leaders in the 1970s trials, began to use the law to challenge apartheid rather than, as in the 1970s, using law only for the purpose of defending those on criminal charges.

Lobban's conclusion cannot, however, be contextualised if one's perspective is the jurisprudential question of the relationship between law and politics. Those who argue for the potential promise of law must be able to show that law has that potential in even the most unfavourable contexts. If the promise of law is one tied to the context in which law finds itself, then the promise of justice is not part of the promise of the law but of whatever the extra-legal factors are that make justice attainable. To put things in the jurisprudential terms coined by H.L.A. Hart, Lobban's pessimistic conclusions support the separation thesis of legal positivism, the thesis that there is no necessary connection between law and morality.²

I will argue that Lobban's conclusions are not supported by his own evidence and that Abel presents a convincing, though mostly implicit, case for challenging the separation thesis. In making my own attempt to bring that case to the surface, I will conclude with some remarks about the implications of these two studies for the general jurisprudential debate about the relationship between law and politics.

Taking Law Seriously

Treason is a crime in a very special category. Where the ideas and political aspirations of those charged are part of the issue in this very strange and complex society of ours as set out at the beginning of this judgment — and given the spectrum of politics of our citizens from Black to white and from far left to far right — with their grievances and aspirations — in most cases legitimate, and the often intemperate and exaggerated language and liberally spiced with political clichés, most of these citizens just striving for a better South Africa — a

2 See Hart, 'Positivism and the Separation of Law and Morals', in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49.

charge of treason should be very carefully considered and reconsidered before it is brought before the court.³

Both Abel (p 369) and Lobban (p 263) quote this passage in full because its assumptions represent so striking a departure from its immediate past. First, the judge recognises that the crime of treason is special — it should not be used to characterise the activity of legal subjects when what they are doing is basically organising local communities on the basis of a legitimate aspiration — the aspiration to give people living in those communities some control over their lives. Secondly, he recognises that the complexity and strangeness of South African society will lead to that aspiration being expressed in the florid language of the resistance to apartheid — the language of revolution. Thirdly, and most importantly, he takes the resisters before him to be part of a larger political community, one united by a desire for a 'better South Africa' even if divided on every detail about how to achieve that desire.

As Lobban convincingly demonstrates, the judges who presided over the trials of the 1970s rejected outright the third assumption, which led them in turn to reject the first two. Their own main assumption was that black South Africans were not part of the same political community as white South Africans, and so it was legitimate to close off to blacks legal channels of political opposition to the South African state. From that assumption it followed that any attempt by blacks to organise political resistance to the state inherently threatened an illegal and violent overthrow of the state, in short treason. With this assumption in place, the aspiration by blacks to achieve political control over their lives in areas of white political controls is by definition illegitimate. Talking about achieving such control, or any conduct that seems directed to this end, is always but a hair's breadth away from incitement to revolutionary overthrow of the state.

The one resounding victory for resisters during this period, the acquittal of several white student leaders and a white university lecturer, is thus quite easily explained (Lobban, ch 4). They were undoubtedly members of the white political community and so it was more difficult to characterise their language and conduct as intrinsically aimed at overthrowing the state.⁴

However, the story Lobban tells from the 1970s illustrates rather than undermines the claim of law's inherent potential for justice. In each of the cases he examines where the state persuaded the judge that the accused were guilty, the success was predicated on the judge allowing the main assumption just sketched to distort grossly the ordinary application of principles of evidence and of criminal law. In each case study, he provides a devastating critique of the police, the prosecution, and the judge, a critique which relies on the fact that they distorted rather than followed these principles.

Thus his story should not lead to the conclusion that one should be pessimistic about law's potential for justice but that human prejudice can reach great depths. Even more importantly, one can read the story as indicating the possibility that the ordinary principles of evidence and criminal law are dependent on the existence of a public law conception of political community which does not exclude those subject to the criminal law from that community.

Lobban discusses this possibility briefly in his conclusion (pp 256–57). He adverts to Ronald Dworkin's theory of adjudication, which requires judges to

3 Per Judge van der Walt, in the course of his judgment acquitting the 'Alexandra five' of the charge of treason (Johannesburg, 1985).

4 See Lobban at pp 107–10, although he does not put the point in exactly this way.

decide all issues of law so as to show the law in its best light. Dworkin takes this requirement to mean that the law must live up to an ideal of political community where each subject of the law is also a citizen with full rights to equality and liberty. As Lobban acknowledges, Dworkin's theory inspired some South African academics to urge judges to work with the idea that their obligation of fidelity to law was to this rich liberal understanding of community, rather than to the racist idea put forward by the ruling National Party.

Lobban rejects this idea as impracticable, first, because it was too difficult an idea to put into practice in such a deeply divided society. Given these difficulties, he says that the idea could 'not impel judges to make different decisions'. In addition, he says that focus on this idea obscures the fact that the problem was different than the judges' lack of a 'sufficiently herculean vision of the South African legal system as a whole to be liberals'. The problem was that the 'judges failed to live up to the ideals of neutrality and impartiality in a much more mundane way' (Lobban, p 257).

But here Lobban reverses the proper order of argument. It was much harder for judges to justify reasoning premised on a Dworkinian idea of community in cases on law which enforced apartheid policy or which gave a wide discretion to the security forces. For in these cases there were often explicit or almost explicit indications of statutory intent to the contrary. If one can make out a case, as I have tried to do, that the judicial obligation in such cases was to adopt a Dworkinian idea, one has an *a fortiori* explanation of what went wrong in the cases on which Lobban focuses.⁵

Lobban does not in fact wholly reject the application of this idea of community:

It may, indeed, be true that in (or across) deeply divided societies, essentially clashing values may not be capable of reconciliation. ... However, it is apparent that in the cases we have seen the *values* appealed to by the parties were not distinct. Black activists and white judges invoked the same concepts of democracy, welfare, and freedom of speech as fundamental values: they disagreed over how to apply them. (Lobban, p 259).

Indeed, he goes even further since he criticises the judges for not paying enough attention to law in the trials of the 1970s. Rather, their chains of reasoning started from a premise which adopted general white sensibilities and fears in order to reach their conclusions and the ordinary rules of evidence and criminal law proved no more than temporary obstacles.

I suggest that where Lobban starts to go wrong is in his assumption that for law to be a constraint on politics, the constraints it provides must be ones that can overcome human prejudice, no matter how deep. To put things bluntly, the law must compel the right answers from legal actors even if they do not take the law seriously. But to set that as the standard for law to meet is, of course, to ensure a pessimistic conclusion and thus support for positivism's separation thesis.

A fairer test is the following. One looks to legal actors who took seriously their obligation of fidelity to law, so that their decisions were based not on mere prejudice but also, perhaps primarily, on their understandings of what law required. Anti-positivists such as Lon Fuller and Ronald Dworkin have suggested that such understandings are always prescriptive as well as descriptive. A participant in the legal order will make claims about law which are informed by her sense of what law ought to be, of the ideal which law serves.

⁵ Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991).

A legal actor who adopts a positivist view of law — law is just the law that exists as a matter of fact — will then not present that view as the conclusion to correct philosophical reflection, untainted by politics and morals, on the nature of law. Rather, the view that law is just the law that exists as a matter of fact will be presented as part of a political theory which argues that this is the politically best way to understand law. If the terrain of such views can then be divided roughly between anti-positivist and positivist views, one can then fruitfully investigate which views make best sense of law in practice, including practice where the conditions seem unfavourable to anti-positivist theories.

Notice that contemporary positivist philosophers reject this kind of investigation since they deny that legal actors who are cast as positivists in the story one tells are rightly so cast. In particular, legal positivists deny that one can decide between views of law on the basis of the resolution of cases where what the law requires is controversial, since they claim that in such cases the law is resolved not by views about law but by the actor's personal sense of what the law ought to be. Their claim puts them in an odd position since they also insist that morally sound legal practice will be produced by legal actors who adopt the separation thesis. They claim both that actual legal practice, especially adjudication, cannot tell for or against legal positivism and that legal practice will proceed better if participants adopt positivist assumptions.⁶

I want to put this issue aside for the moment in order to examine Abel's more optimistic account of the relationship between law and politics, an account which I will argue supports anti-positivism because of the doubt that it casts on the separation thesis.

The Politics of Law

[N]o state exists where the final authority is not vested in an organized defence force. The competence to apply an armed force in order to combat any armed resistance, and thereby securing the maintenance, securing and maintaining state security, law and order results typically from the historical foundation of any state. In South Africa too, the state has the duty to protect all individuals by securing law and order. In that regard the state is competent to compel and prescribe to its subjects in order to compile an effective defence force.

On the other hand it is also the duty of the subject in return to respect the aforementioned claim by the state. That is the basis of the obligation to render service in the Defence Force.

This passage is quoted by Abel from the remarks by Additional Magistrate P.H. Bredenkamp (Johannesburg, 1987) on sentencing a conscientious objector to military service to the six year term of imprisonment mandated by the relevant statute (Abel, p 103). The remarks contain, as Abel says, a 'theory of political authority and moral obligation' (*ibid*) although he does not elaborate it.

Instead, in analysing various decisions to do with white resistance to the military, Abel notes that Bredenkamp and other judicial officers as well as prosecutors made a strategic error during the court proceedings of engaging, indeed often inviting engagement, in debate about the substantive merits of the cases presented for resistance. It was an error because they made a 'poor showing' in such debates, in effect permitting the accused and their witnesses to expose the illegitimacy of the political order. They could only have made such a mistake, Abel says, because of their 'unquestioning conviction in the moral rightness of the South African state'. All they had to do was to expose the accused to the awfulness of the

⁶ See Hart, n 2 above.

threat of a communist-instigated black 'total onslaught' on South Africa for the accused to 'acknowledge the military imperative' (Abel, p 120).

But the passage quoted above suggests that the magistrate was more impressed than Abel supposes by the ideological divide between the court and the accused. The justification Bredenkamp offered was not simply an ideological one about the moral rightness of apartheid. By way of elaboration of his justification, note the striking resonance between his remarks and the following passage from the 'Review and Conclusion' to Thomas Hobbes's *Leviathan* (1651):

And thus I have brought to an end my Discourse of civill and Ecclesiastical Government, occasioned by the disorders of the present time, without partiality, without application, and without other designe, than to set before mens eyes the mutuall relation between Protection and Obedience; of which the condition of Humane Nature, and the Laws divine, (both Naturall and Positive) require an inviolable observation.⁷

Such resonance is no coincidence. Hobbes's ambition in *Leviathan* is to provide a theory of the relationship between state and individual which solves the problem of how to create order and stability in a politically fractured society. He wants a solution that seems capable of convincing individuals who might disagree radically on all substantive political and moral matters. Crudely put, Hobbes's solution asks us to accept that, since order is preferable to chaos, we should take the ground rules for social and political life set by our political sovereign as morally binding givens. We trade our obedience for the political protection which makes life something better than the brutishness of the state of nature.

Law enters the picture because it is through positive law that the political sovereign makes his judgments about such givens known to us. In order to complete the picture, judges must accept an obligation of fidelity to law which requires them to interpret the law in so far as this is possible in accordance with the manifest signs of the sovereign's intention. The subject's duty to obey the law and the judge's duty to apply it in accordance with its positivistically understood intent are not then dependent on their agreement with the policy or content of the law, but on their understanding of the relationship between protection and obedience.

It is, however, important to see why this picture of Hobbes's political and legal theory is a crude one. Hobbes's arguments are from the ground up designed to appeal to individual reason, on the assumption that each individual must be taken to have equal powers of reason. The idea of individual rationality as one of the basic building blocks of political and legal theory pervades his entire work. The point of the legal order, then, is not merely to secure stability but to secure stability in a way that rational individuals will recognise as conducive to their interests. Without much effort, one can find place after place in Hobbes's description of civil society where the individual is given a toehold which casts into doubt the crude authoritarian positivism often attributed to Hobbes.

That the picture is crude does not mean that it is inaccurate. Rather, what we find is a deep tension in Hobbes's political and legal theory between a positivistic command theory of law, one which rejects the separation thesis of contemporary positivism, and his individualism. There is, I suggest, exactly the same tension in Magistrate Bredenkamp's remarks. The duties of the law do not run in one direction — owed by individual to state — the state is also under a duty to the individual to offer him benefits in a fashion justifiable to him. Bredenkamp's remarks are an attempt at such a justification, an indication of the obligation on legal authorities to justify the law to those subject to it.

⁷ Hobbes, *Leviathan* (C.B. Macpherson ed, Harmondsworth: Penguin, 1985) 728.

This obligation creates tensions which go beyond the dilemma which Abel identifies as one basic to 'the liberal state: it can coerce only through law, which simultaneously endows subjects with powers of resistance'. By this he means that a 'complex regulatory structure inevitably contains inconsistencies that can be exploited by those seeking to frustrate it ...' (Abel, p 62). Indeed, as he points out, this dilemma in South Africa could work as easily against resistance to apartheid as in favour of it.

Take the particular area in which he explores the dilemma — South Africa's pass laws which permitted only certain categories of black people to reside and work in 'white areas' (Abel, ch 3). Abel shows how legal victories which extended the rights of black people in this regard were often undercut by bureaucratic resistance to judicial pronouncements, a resistance which exploited the same complex structure that made the victories legally possible.

But in order to make the arguments at all, one had to have a vision of South Africa as a country in which all those subject to the law should have the right to live with their families in the place where the main wage earner lawfully resided. The Appellate Division — South Africa's highest court — carefully kept away from any hint of such a vision in the judgments that provided these victories and limited their scope severely. But the victories were such because they placed blacks living in white areas on one end of a continuum whose other end required full acknowledgement of the equality before the law of all those subject to it. That the limited scope made it possible for lower echelon officials to frustrate the victories does not tell against this point.

I suspect that the judges of the Appellate Division limited the legal scope of their judgments either because they rejected the vision of equality of all South Africans or because of a traditional judicial conservatism. But if their motive was their rejection of that vision, it is significant that despite that rejection they found themselves compelled to give a judgment at odds with it. And if their motive was conservatism, it is worth noting that judicial conservatism is also necessarily about judges conserving a sense of their appropriate role in maintaining legal order.

In this last regard, Abel suggests that in another context — the Appellate Division's reading out of a statute of mandatory minimum sentences for conscientious objectors to military service — '[j]udicial concern for the rule of law may be evoked less by state oppression of citizens than [by] legislative disrespect for judicial authority' (Abel, p 123). But even if judges are motivated often more by anxiety about retaining a meaningful role in the legal order than by a desire to do justice through the law, it may well be the case that to give their role meaning they have to take seriously the idea that the rule of law has substantive as well as procedural components to it. That idea will create tensions for judges, whatever their motives, whose judgments fail to live up to the most basic substantive commitment of the rule of law — the commitment of the law to the equality of all legal subjects.

Abel makes a somewhat similar point in his discussion of the Alexandra Treason Trial, the trial that issued in the statement by Van Der Walt J, quoted above. This was a trial of community activists in a large township outside of Johannesburg where the Alexandra Action Committee (AAC) sought to bring order to the township by setting up their own local government structures, including courts. Abel concludes his discussion of the trial as follows:

The rule of law has substantive content as well as procedural criteria. The accused were prosecuted for engaging in behavior that would have been praised anywhere else (and was

widely lauded abroad). They were charged under laws they had no role in enacting. The case was prosecuted and heard by men they had no say in appointing. Acquittal came as an act of grace, not recognition of a right. Blacks dependent on white mercy do not enjoy the rule of law (Abel, pp 382–83).

But this description surely is not altogether accurate. We have seen in Van der Walt J's remarks a clear recognition that there was one political community in South Africa, however riven it was (and is) by conflict over fundamentals. The fact that the trial was contaminated throughout by the fact that the accused lacked the most basic political rights only heightened the tensions between the promise of law and the facts about the positive law of South Africa. For the judgment placed the Alexandra activists within a political community from which the positive law sought to exclude them, and found them not guilty of a crime which could only be considered as such if one thought it were *per se* illegitimate for black people to build and control local government structures.

Throughout his book, Abel shows how in situations short of civil war, the role of law as an instrument of politics is never unproblematic.⁸ Law may be 'politics by other means' but it is politics under the constraints of legal order, constraints which impose conditions of publicity, obligations to justify official decisions, and a general obligation on judges to find a role for themselves as the enforcers of legality, not just of positive law. Hence, Abel warns against the false conclusion that law 'either makes all the difference or no difference at all' (Abel, p 549).

That law can make a difference, even under very unpromising conditions, goes a long way to showing that legal order or legality places constraints on the powerful which at bottom are the constraints of commitment to a moral community of free and equal citizens. Of course, there will be many ways of understanding that commitment, ranging from a very thin Hobbesian conception of a community of self-interested rational individuals through Fuller's idea of reciprocity between ruler and ruled to Dworkin's idea of liberal integrity.⁹ And legal actors will have to take seriously the idea that they have an obligation of fidelity to law (Fuller's term) before the commitment has effects on legal practice.

Contemporary positivists agree that it is an essential part of understanding the phenomenon of law to understand it from the inside, from the perspective of an 'internal point of view' of legal actors committed to a properly functioning legal order. Hence, they will not quibble with the claim that legal actors should take seriously the idea that they have an obligation of fidelity to law. The real debate between positivists and anti-positivists is about moral community and legal order. I hope to have indicated here the immense value to this debate of Lobban's and Abel's investigations of the law of apartheid South Africa.

8 In ch 6, Abel concludes that, in the conflicts arising out of the war between the African National Congress and Inkatha (the Zulu nationalist political group) in Natal, law proved 'impotent' (p 209).

9 Whether Hobbes is ultimately a positivist or not is a complex issue, which I cannot go into here.