NOTES AND COMMENTS

DUGARD’S MORAL CRITIQUE OF APARTHEID JUDGES: LESSONS FOR TODAY

I DUGARD’S CRITIQUE

John Dugard became a professor of law at the University of the Witwatersrand (Wits) School of Law exactly four decades ago, in 1969. It was a brave appointment – an academic lawyer of unflinchingly liberal commitment at a time of acute illiberal oppression. It was a promotion that was to garner Wits no favour with the authorities, for Dugard soon showed that his concept of professorial research did not involve quietly burrowing away in the Wits law library. His inaugural address in 1971, 1 elaborated in his 1978 book, Human Rights and the South African Legal Order, 2 presented a scathing critique of the judiciary’s response to apartheid legislation. Amidst some principled decisions, Dugard represented judges’ rulings on apartheid statutes that invaded civil liberties as inert, imaginationless and generally craven.

Worse, he argued that they should own up to moral responsibility for what they did as judges. They could not escape it by blaming Parliament.

What lay behind his critique was this: in controversial cases, judges often claimed when giving pro-executive decisions that their task was merely to give effect to the ‘intention of the legislature’. Statutory interpretation in cases of borderline meaning therefore involved no more than ascertaining what Parliament most likely intended, and then giving effect to that interpretation.

This approach – which was widely prevalent at the time among Anglophone judges – Dugard derided as the ‘mechanical’ or ‘phonographic’ view of the judicial function. To claim that statutory interpretation involved only value-neutral discovery and execution of the intention of the legislature was both delusory and pernicious.

It was delusional in cultivating the belief that judges merely find law and do not make it; that they are wholly neutral arbiters of the law, which they discover and apply without the influence of any of their values or political beliefs.

And it was pernicious because it permitted judges to put out that they had no moral responsibility for applying reprehensible laws.

Dugard blamed the theory of legal positivism and its conception of adjudication for this. He claimed that positivism’s view of law as command backed up by sanction, and its separation of law from morality, resulted in ‘the largely quiescent attitude of the legal profession toward statutes invading individual liberty [… and] the mechanical search of the judiciary for the intention of the legislature in these same statutes’. 3

2 J Dugard (1978).
3 Dugard (note 1 above) 186.
Further, Dugard argued, positivism permitted and indeed encouraged judges to rely on, without acknowledging, what he called ‘the inarticulate premise’. This he described as those unavoidably human but ‘subconscious prejudices and preferences’ that influence judges in making their rulings.\(^4\)

Positivism, by promoting a mechanical, value-free, approach to the judicial process, provides a jurisprudential cloak of concealment, and thereby encourages subliminal forces.\(^5\)

Dugard’s critique was not confined to judges. He condemned the legal profession’s ‘quiescent attitude’\(^6\) to unjust statutes for aiding evasive judicial attitudes. But ‘a major part of the blame’ for the supine and evasive stance of apartheid judges he apportioned to legal academics. I return to this point later.

By corollary, he was appalled by the courts’ hostile response when legal academics were outspokenly critical. He scathingly condemned the prosecution and conviction of Professor Barend van Niekerk for contempt of court, for a speech in which he famously called on judges to deny creditworthiness to evidence obtained through detention under the Terrorism Act.

Dugard highlighted some flagrant instances in which white South African judges (most of whom, he rightly noted, were loyal to the status quo) disclaimed their moral role, thereby permitting breaches of civil liberties.\(^7\) But he was careful to select instances from some decades back, thus avoiding an intensely controversial trio of cases in the early 1960s in which the Appellate Division declined open opportunities to give rulings that favoured individual liberty.\(^8\)

II  **LEGAL POSITIVISM**

But what the 1960s’ decisions had in common with the earlier cases was that in all of them the judges seemed to take cover behind tenets of legal positivism.

Lawyers under apartheid would have done much better, Dugard contended, had they adopted instead the approach he espoused – namely that they should actively engage with and fight the injustice of apartheid. The theoretical basis he advanced for this was a combination of legal realism (which recognised judges’ human inclinations, prejudices and preconceptions in coming to their decisions) and natural law (which imbued the law with a necessary morality). This he counterpoised diametrically with the prevailing ‘positivist’ attitudes of the time.

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\(^4\) Ibid 188.
\(^5\) Ibid 189.
\(^6\) Ibid 186.
\(^7\) In *In re Seedat* (1914) 35 NLR 198 and other similar cases, culminating in a 3-2 decision in the Appellate Division in *R v Padsha* 1923 AD 281, courts upheld delegated legislation prohibiting ‘non-white Asian’ immigration. Dugard pointed to facts about the backgrounds of various judges who ruled in favour of the legislation as compared with those who did not, and asked ‘Is it really surprising that the courts of the provinces with the largest Indian populations, where anti-Indian prejudice is strongest, found in favour of the regulations?’ (192). He also found ‘signs of concession to white opinion and prejudice’ in the majority judgments in the Appellate Division (192).
\(^8\) *Loza v Police Station Commander, Durbanville* 1964 (2) SA 545 (A); *Rossouw v Sachs* 1964 (2) SA 551 (A); *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A).
In fact, Dugard’s critique appears to have mischaracterised legal positivism. Certainly in the formulation of HLA Hart9 (to whom he alluded in his inaugural lecture),10 positivism does not exempt lawyers or judges from responsibility for the immoral content of laws or from accountability for their enforcement. In his renowned debate with Professor Lon L Fuller of Harvard Law School, Hart charged that the German scholar Gustav Radbruch (who claimed that legal positivism was responsible for Nazi judges’ quiescence under Hitler’s laws) had ‘only half-digested the spiritual message of liberalism’.11 Hart would no doubt have directed equally scathing criticisms at Dugard’s characterisation of legal positivism.

In addition, Dugard’s mix of American realism and natural law omitted to take account of the powerful critique of Hartian positivism by Ronald Dworkin, then relatively recent,12 in which Dworkin systematically showed that no coherent theory about the truth conditions of legal propositions in a system that involved adjudication can exclude the deep terrain of moral reasoning that decisions in hard cases require judges to enter. The ascertainment of any legal ‘rule’ therefore unavoidably involved moral principle.

Perhaps the most powerful practical implication of Dworkin’s attack on the tenets of legal positivism is that it accords judges full moral responsibility for what they decide. This is because his account of adjudication illuminates how, in every borderline or contested case, principles and values (and not pre-cast rules) determine the outcome – and it is the judge, in grappling to find the correct answer to the case before her, who must weigh the importance of every principle and value, and thereby come up with the right answer that gives the best fit between institutional history and morality.

But doctrinal reservations do not diminish Dugard’s passionate conviction that apartheid legislation rendered the South African legal system morally abhorrent. For expressing these views he faced opprobrium and even prosecution (for quoting Dr Nthatho Motlana, a banned person), but he did not waver.

The work of Dugard, together with that of his contemporary Professor AS Mathews of the University of Natal Law School,13 changed the perceptions of generations of lawyers about the role of the judiciary in enforcing apartheid legislation. They also recast the debate about the role of the law and the leeway lawyers and judges have in interpreting statutes to ensure just outcomes to cases.14

These insights inspired Dugard to help Arthur Chaskalson and others to start the Legal Resources Centre; and to found the Centre for Applied Legal

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10 Dugard (note 1 above) 185.
11 Hart (note 9 above) 618.
Studies (which he invited me to join in 1986, and where I spent eight challenging and deeply rewarding years). They also spurred his own success as a practitioner-advocate in several prominent challenges to apartheid laws in the 1980s.

Dugard’s critique required courage of an order that is difficult to appreciate fully in retrospect. And he made his criticisms at a time when virtually all other academics and most practitioners treated the courts with a self-protecting diffidence and an often obsequious deference that disabled them from openly challenging apartheid.

His central point remains valid today: that an honest recognition of the law-making role of judges is essential to the legitimacy of their decisions. He noted that the values of individual well-being and dignity and human freedom were part of South Africa’s rich Roman-Dutch legal tradition. Judges could and should draw on these values when interpreting liberty-restricting legislation. Doing so would permit them to give rulings that minimised invasions of civil liberty. While such decisions would excite executive displeasure and trigger legislative reversal, Dugard was insistent that only if judges followed this path could justice be done and legitimacy restored to the South African judiciary.

III SHOULD JUDGES RESIGN?

Yet Dugard did not believe that the moral abhorrence of apartheid law demanded that conscientious judges should resign. In condemning the conviction of Barend van Niekerk, he remarked, perceptively:

“It is almost as if the courts have invoked the contempt power to protect them from the memory of Nuremberg, to spare them the agony of deciding, or even considering, at what point a law ceases to be law on account of its immoral content and at what point confrontation or resignation becomes the lot of the judge.”

When does resignation become the lot of the judge? Dugard clearly implied that the German judges should have resigned under the Nazis. But equally he indicated that South Africa under apartheid differed in significant measure. Although apartheid was iniquitous, the legal system enforcing it was not so irreparably evil that conscientious, ethically reflective judges (moral judges) should resign from office.

This led to a famous confrontation with Professor Raymond Wacks, who in his own inaugural lecture in March 1983 contended that no moral judge could continue to participate in the institutionalised injustice of apartheid. Wacks doubted that judges had as much leeway as Dugard thought they had to do good under apartheid. Invoking Dworkin’s model of adjudication, Wacks suggested that honest judges would not find enough moral principle to do right. Given the constraints wicked laws placed on their jurisdiction,

15 Dugard (note 2 above) 300.
17 Ibid 270ff.
18 Ibid 276–8.
apartheid judges could not do enough good to counter-weigh the evil their continued presence on the bench would wreak by legitimating such a wicked system. Wacks insisted that:

If the [moral] judge is to square his conscience with his calling, there would appear to be no choice open to him but to resign.

Dugard strongly disagreed. There was still scope under apartheid for moral judges to do justice despite the repressive laws that they were called on to enforce. He contended that the ‘strange duality of the South African legal system, which allows repressive laws to be interpreted in accordance with liberal common-law principles’ allowed judges to serve justice even while operating under conditions that conduced to injustice.

To this Wacks rejoined that ‘the “liberal” model of the South African legal system does not correspond to reality’.

Dugard’s defence of liberal judges remaining in office under apartheid itself had Dworkinian overtones: he urged that judges should use their power to incorporate the best aspects of South African legal culture in liberal rulings that favoured individual liberty and dignity. By contrast, resignations in protest would have little effect, whereas judges sensitive to human rights could remain on the bench to mitigate the harshness of apartheid.

Throughout, he remained fundamentally hopeful about the long-term prospects of rehabilitating the South African legal system. He found that in the late 1980s judges had become ‘more sensitive to human-rights issues’ and that there were ‘new opportunities open to lawyers in the field of public-interest law and in the advancement of human rights’.

And history has vindicated Dugard. The threadbare strands of justice that remained under apartheid – the embattled common law heritage of individual liberty, and the legacy of brave judicial rulings that, in the face of government threat and oppression, asserted human dignity and the rule of law – were collated during the constitutional negotiations and woven into the grand and generous vision of the present Constitution of the Republic of South Africa, 1996.

Indeed, the clear voice of Dugard’s denunciation of apartheid collusion by lawyers and judges deserves credit as one of the reasons why today we have a law-based constitutional order whose legitimacy is politically unquestioned.

And President Mandela himself applied these lessons in 1994. He too was an officer of the court under apartheid, as an admitted attorney. He fought to retain this status so as to fight injustice. When the law society brought

19 Ibid 279.
20 Ibid 282.
22 Dugard ibid 290.
23 Wacks (note 21 above) 298.
24 Dugard (note 21 above) 292.
26 See Cameron note 14 above.
proceedings to strike him off for the Defiance Campaign, Mandela found a bench of two liberal judges, Ramsbottom and Roper JJ, who bravely refused to do so.\textsuperscript{27}

Although later when tried for treason Mandela was struck off, he deeply understood the complexity and richness of this past. He honoured it in appointing to the Constitutional Court three outstandingly courageous and principled judges, who had continued to hold office under apartheid. They were Justices Didcott, Goldstone and Kriegler.

That decision rebuked the view that moral judges should resign from office under apartheid. It does so still today.

What is more, the tradition of vigorous public interest organisations and lawyering, which Dugard himself did so much to nurture, has continued in our democracy, helping to advance the rights of the marginalised, and enriching our practice of constitutionalism.\textsuperscript{28}

Dugard recognised that the decision whether to remain in office in an unjust system entails an instrumental calculation. From the perspective of a moral judge considering his or her contribution to good or evil, the question is always how to bring about the best consequences.

The American legal philosopher, Joel Feinberg observes of this process:

\begin{quote}
If a judge's resignation is motivated entirely by his desire to preserve his own moral purity, so that his hands will not be soiled with the blood of others, then he makes a poor hero, though his action on his own behalf might have required considerable courage. But would not a more fruitful use of his courage and a craftier use of the power of his office, if any, be more commendable? What help [considering an anti-slavery judge in a system that permits slavery] does he give the suffering slaves by concentrating his efforts on his own integrity? I suspect that efforts to preserve integrity in situations like these will inevitably be self-defeating, because true integrity requires more effective resistance and less narcissistic self-concern. 'It is a waste to refuse to use accessible power for a good purpose'.\textsuperscript{29}
\end{quote}

IV DUGARD’S LEGACY

Reflecting on Dugard’s work suggests several striking features. First, its moral prescience: virtually all of his most important criticisms of apartheid judges have been vindicated. His major claim, controversial at the time, that

\begin{footnotes}
\footnotetext{27}{\textit{Incorporated Law Society v Mandela} 1954 (3) SA 102 (T). Ramsbottom J said (108D–F):
Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But his offence was not of a 'personally disgraceful character' and there is nothing in his conduct which, in my judgment, renders him unfit to be an attorney.}

\footnotetext{28}{The Constitutional Court recently paid tribute to this tradition, and to its contribution to the Court’s own work: \textit{Biowatch Trust v Registrar, Genetic Resources} 2009 (6) 232 SA (CC) para 19.}

\footnotetext{29}{J Feinberg \textit{Problems at the Roots of Law} (2003) 21.}
\end{footnotes}
judges have an explicitly value-laden and moral role to play in adjudication, has been vindicated.

Analytically: there are few judges who today would try to maintain that their job is simply to discern the will of Parliament. While statutory meaning remains a central quest in adjudication, the role of value and principle in determining it is now amply recognised, by theorists and practitioners.

But, more grandly and practically, Dugard’s vision of morally explicit and morally responsible judges has been expressly embodied in our Constitution. The Constitution trumpets its founding values. They include human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; the supremacy of the Constitution and of the rule of law; and democratic government ‘to ensure accountability, responsiveness and openness’. Judges, like the legislature, the executive and all organs of state, are bound by the Constitution, and are obliged to enforce its values when interpreting any legislation.

The fact that his views are now seen as orthodoxy should not obscure the courage that it took to express them at the time.

Second, its unflinching demolition of views he found wanting, intellectually and morally. Dugard wrote at a time when the norm for academic critics was deference to the courts, sometimes unctuous. By contrast, his writing was candid, honest and outspoken.

Finally, its methodological clarity: Dugard’s arguments were forcefully laid out in accessible language, thoroughly reasoned, and sustained by rigorous norms of rationality.

What remains are the contemporary implications of Dugard’s moral critique of apartheid judges, which is intensely apposite today.

First, it demonstrates the importance of robust academic criticism of the courts. Academics play a vital role as a watchdog of judicial diligence and scrupulousness and exertion.

Professor Kircher of Marquette University Law School says that the task of academic lawyers is to ‘tweak the noses of members of the judiciary when [the academicians] find [the judges’] actions suspect.’ Judges do read articles in law journals, and in South Africa they are often cited in judgments, even if as Judge Robert D Sack has said, the judges’ motives are not always pure. ‘Judges use [law reviews] like drunks use lampposts — more for support than for illumination’.

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30 Constitution Chapter 1, Founding Provisions, s 1(a)–(d).
31 Bill of Rights s 8(1).
32 Ibid s 39(2).
In its first 15 years, the Constitutional Court has been treated with much deference. Many South African legal academics have been too politically correct to challenge its decisions with unbridled courage. The Court has been the darling of academia, especially when one contrasts the deference to it with the levels of scrutiny to which the Supreme Court of Appeal has been subjected.

This dearth of rigorous surveillance has contributed to some weakness in the Court’s jurisprudence. Dugard warned in his inaugural lecture that ‘[a] bsence of criticism does not promote infallibility – it merely encourages belief in infallibility with all its attendant dangers’. 36

The lack of robust engagement may have allowed the Court to come to think it could do anything. Partly in consequence, critics have charged that it has ignored its own precedents, 37 altered the facts in matters before it, 38 and delivered some judgments that are prolix and inaccessible. 39

The honeymoon with academics seems to be coming to an end. Several robust criticisms of the Court have recently been published, and that is to be welcomed.

Jonathan Lewis has written a scathing critique in an English journal, arguing that there are fundamental flaws in some of the Court’s recent decisions and that these flaws are connected to operational problems in the Court’s functioning. 40

Anton Fagan, in an article titled ‘The Confusions of K’, argues that the Court ‘failed to justify both its substantial conclusion and its jurisdictional one’ in K v Minister of Safety and Security 41 (where it granted a woman who was raped by on-duty policemen an action against their employer on the basis that although the rape was a deviation from employment duties, there was a ‘sufficiently close connection’ between their employment and the wrongful conduct). He calls on the Court to rectify the errors in its approach as soon as possible. 42

Richard Stacey has published an article on the Court’s decision in Chirwa v Transnet Ltd 43 in which he argues that the ultimate conclusions are ‘absurd’. 44

I do not agree with or endorse all the criticisms these writers have made. Some of them are unfair and even ungenerous, and some may get the law wrong.

But the mode of engagement – robust, reasoned, substantive and unafraid – is reminiscent of Dugard. And that is to be welcomed. If academia is to help oversee the judicial function, its academic criticism must be outspoken and unflinching.

36 Dugard (note 1 above) 181.
37 See Chirwa v Transnet Ltd 2008 (4) SA 367 (CC).
38 See NM v Smith 2007 (5) SA 250 (CC).
39 See Minister of Health NO v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC).
41 2005 (6) SA 419 (CC).
43 2008 (4) SA 367 (CC).
Of course, it must also be based in principle, well-researched, thoroughly justified and in conformity with elementary reason. This is because academics, legislators, politicians, the public and the courts are engaged in a joint interactive rational inquiry (or ‘dialectic’).

The purpose of our constitutional dialectic is to elaborate and defend a conception of the rule of law and of ‘responsive’ democracy. This can occur only if the contributions to it comply with the values of reason and truthfulness. These are central to the rule of law.

Second, Dugard shows the importance of speaking out with courage and reason, even in the face of vilification.

Unfortunately, reason and truthfulness appear to be getting a hard time in our country at present.

Recently many South Africans (including academics and legal professionals) have become wary of voicing inconvenient opinions, and again race and racial rhetoric has been used to produce silence. Some in pursuing personal and political advancement have made race a primary instrument. Critics if white are dismissed as illegitimate. Conversely many black South Africans seem unwilling to speak because they will be labelled ‘house natives’ or seen as disloyal.

This racialisation of our public debate may be the most pernicious legacy of our poisonous racial past.

In both cases, the merits of the views expressed are sought to be suppressed by personal vilification. The cost is heavy, to both the individuals involved, and to our national debate.

Third, as I wrote earlier, Dugard has been vindicated on the issue of resignations for ethical reasons. But I want to return to the debate’s implications for us today.

As an advocate I fought cases in the apartheid courts. And I am glad that moral judges remained on the bench. I acted as Dugard’s junior in the Moutse case, where he conceived and executed a brilliant pseudo-apartheid strategy to thwart the government’s Bantustan policy. He argued that Moutse, which was largely Pedi-speaking, could not properly be incorporated into KwaNdebele, a ‘homeland’ designed for Ndebele-speakers. The Appellate Division upheld this argument and set aside the President’s proclamation, thereby putting paid to KwaNdebele’s ‘independence’.  

We were in no doubt that the appellate judges did so for enlightened libertarian reasons. As Etienne Mureinik most trenchantly observed:

If there is no point in being a conscientious judge, there is no point in being a conscientious advocate, because the arguments of conscientious advocates are calculated to persuade only conscientious judges.  

There is a parallel with recent events. A number of judges recently withdrew their candidacy for the Constitutional Court, in some cases it seems at least partly because of concerns about the integrity of the appointment process.

Their reservations about the process may have had substance. But I wanted them to stay in it – partly for selfish reasons, because I wanted good and true and talented candidates to keep themselves available for appointment to the Court; but partly also because I think it would have been the right thing to do.

If it is right to hold office as a judge in South Africa – and I think it is – then it must be right to hold yourself available for service in the Court that is the highest guardian of the Constitution.

It is possible to imagine a situation in which it would be wrong to hold judicial office in South Africa. If corruption and crime so irretrievably undermine our constitutional democracy that the Constitution has become a mere collection of words and empty aspirations, then there would be no point in continuing to hold office under it.

Again, if we fail to give substance to the promise of socio-economic equality and dignity for all in our country, one could imagine a situation where the courts and the Constitution would merely serve to legitimate the comfort and ease of an affluent and crony-connected elite, while the majority is condemned to inadequate and degrading material conditions of life.

But that is not where we are. Not nearly. On the contrary, much more even than under apartheid, we have good reason to fight for justice and equality for all in South Africa. And in that battle, the Constitution is our main instrument of struggle.

The arguments Dugard made for using the legal system as an implement in the fight for justice apply with greater force today. The array of tools is so much richer, and the legitimate aspirations the system embodies encourage us so much higher.

The evil laws that provoked Dugard’s ire have been repealed. The apartheid legal system has been replaced with a supreme Constitution, a responsive democracy, and a justiciable bill of rights that includes social and economic rights.

The enemies of justice are no longer a repressive, racist state apparatus. They are crime and the risk that our institutions will fail not only through lack of capacity but also because they are corroded from within by those who are only malignly self-interested in personal gain.

Amidst these insidious risks, the rule of law still needs vigilant protection. It needs protection not only against politicians, but against timid, cowardly and silent lawyers. It needs protection against judges who may be arrogant or idle or inert.

Lawyers in all walks – judges, academics, legal commentators – must confront one another with open, frontal and well-reasoned debate to defend the rule of law against the threats to it.

John Dugard’s courage and candour and outspokenness, in service of reason, showed the way.

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