

**HUMAN RIGHTS, APARTHEID AND LAWYERS. ARE THERE
ANY LESSONS FOR LAWYERS FROM COMMON LAW
COUNTRIES?:
The Marsdens Human Rights Lecture***

JOHN DUGARD**

I. INTRODUCTION

It is a great honour for me to deliver the Marsdens Human Rights Lecture. At the outset let me express my gratitude to the University of New South Wales for inviting me to teach at the Law School. I have learnt much from this experience: above all I have enjoyed being part of the Law School, and getting to know its teaching staff and its students. Tonight is Marsdens night. Marsdens has done much for the School of Law in all sorts of ways and I am confident it will continue to do so. It has made my visit possible: I have the privilege to speak to you this evening as the Marsdens Visiting Fellow in Human Rights. For this I am most grateful.

I shall be talking about the part played by judges and lawyers in opposing, supporting or avoiding injustices in society. Inevitably I shall generalise, despite the fact that I know that generalisations are misleading. This means that

* Delivered 18 November 1991.

** BA, LLB (Stellenbosch), LLB, Diploma in International Law, LLD (Cantab), Professor of Law, University of the Witwatersrand, Johannesburg, Visiting Professor of Law, University of New South Wales, 1991.

I may fail to give sufficient credit to the work of individual lawyers. For this I apologise. But it is from generalisations that one can best understand a phenomenon.

II. SOME MAJOR GENERALISATIONS

Judges and lawyers have seldom performed well in a situation of crisis involving the security of the State - and the denial of human rights.¹

The failure of the German legal profession to oppose Nazism in its early stages is well known. Gustav Radbruch, Minister of Justice under the Weimar Republic and the first German law professor to be dismissed by the Nazis, has written eloquently about the tragic manner in which German judges and lawyers allowed themselves to become part of the Nazi machine.² They failed to protest when Jewish judges were dismissed and Jewish lawyers denied the right to practise because they were not Jews. They failed to protest against the ousting of communists from the profession because they were not communists. And they failed to protest against the destruction of the Rule of Law because they were lawyers whose task was to apply the law and not to oppose it.³

Well, you may say, the Nazi experience is unique. Certainly this could not happen in a common law society, in which lawyers have inherited the wisdom and courage of Coke, Blackstone, Dicey and Denning; of Marshall, Holmes and Earl Warren. But of course it has happened already, albeit to a lesser degree. Great American jurists upheld the Fugitive Slave Law⁴ and fabricated the *Dred Scott*⁵ decision. Later they gave approval to discriminatory laws in *Plessy v Ferguson*⁶ when they upheld the validity of separate but equal facilities for black and white, knowing full well that separate facilities could never be equal. Still later, during the Second World War, they gave their blessing to the internment of thousands of Japanese Americans in the *Korematsu*⁷ case. These were all examples of judicial failures. But the legal profession endorsed these decisions and were also guilty of inaction. Witness the failure of the American Civil Liberties Union to oppose the internment of Japanese Americans in the War years and the harassment of intellectuals during the McCarthy period.⁸

1 J Dugard "The Judiciary in a State of National Crisis - with Special Reference to the South African Experience" (1987) 44 *Washington and Lee Law Review* 477.

2 B Van Niekerk "The Warning Voice from Heidelberg - the Life and Thought of Gustav Radbruch" (1973) 90 *South African Law Journal* 234.

3 L Fernandez "The Law, Lawyers and the Courts in Nazi Germany" (1985) 1 *South African Journal on Human Rights* 124.

4 R Cover *Justice Accused. Antislavery and the Judicial Process* (1975).

5 *Dred Scott Sandford* (1857) 60 US (19 How) 393.

6 (1896) 163 US 537.

7 (1944) 323 US 214.

8 Note 1 *supra* at 480.

Britain's record is not so bad, simply because British society is not so bad. But the House of Lords' decision in *Liversidge v Anderson*,⁹ in which internment was authorised without judicial control, was hailed as that court's contribution to the war effort, rather than as a blow for liberty. And, of course, the less said about the performance of British judges in cases involving the IRA the better. Some have said that it is virtually impossible for an IRA activist to get a fair trial before an English judge and jury. And if the organised legal profession has made its protest over this deplorable situation, I have not heard it.

The sad truth, I fear, is that judges and lawyers, generally, are *of* the establishment and *for* the establishment. When the establishment of which they are a part is threatened and the law is invoked as an instrument of discrimination and repression they generally support the use of the law in this way. Support may take several forms. Sometimes it is open and enthusiastic; but this is unusual and largely confined to those unscrupulous lawyers who see some personal advantage for themselves. In most cases support simply takes the form of neutrality and avoidance. Lawyers simply refuse to get involved. They do not make their talents available to the regime. Instead they direct their talents to the large financial institutions. They are not available to help the victims of the system - often fanatical and difficult and always indigent. They are not available to defend the Rule of Law - as this seldom impinges on commercial legal practice.

The above generalisations are borne out by the South African experience.

III. THE ADVENT OF APARTHEID

South Africa is a common law country. Its common law is contemporary Roman Dutch law, a blend of progressive principles of Roman law, Dutch law of the 17th - 18th centuries and English law. The English influence is profound - both on the law and on the legal profession. We have a divided Bar, with a division more severe than that of Britain or Australia. Our law of procedure and evidence is largely English. And our judges still model themselves on those of England. Wigs are no longer worn - but our judges are not merely "honours", they are still "lords". "If your lordship pleases", "may it please your lordship" are the common refrains of the barrister.

In 1948 the National Party came to power on the platform of apartheid. Hitherto racial discrimination had been largely conventional. The Rule of Law was still revered. But apartheid meant that the law would now be used to promote racial discrimination and to suppress dissent. There would no longer be any room for equality before the law and the basic civil liberties.¹⁰

9 [1941] AC 206.

10 For an account of the law of apartheid, see J Dugard *Human Rights and the South African Legal Order* (1978).

Initially the judiciary and the legal profession stood firm against the abuse of the law in this new form of social engineering. The Appeal Court confronted the Government directly by interpreting the laws of apartheid so that they did as little harm as possible. Although South Africa, like Britain, worships at the altar of parliamentary supremacy and denies judges the right to test Acts of Parliament, there was still room for judicial manoeuvre. Ambiguous racist statutes were interpreted in favour of equality; ambiguous repressive laws were interpreted to accord with individual freedom. Delegated legislation was struck down when it was unreasonable; administrative action was set aside when it offended notions of natural justice.¹¹ The response of the legal profession was equally firm. Protests were lodged and demonstrations staged.

By 1960 the apartheid legal order had been finally enacted. The law now put a racial classification on each individual and made it a crime for people of different races to marry, to make love, to live together, to study together, to work together or to socialise.¹²

Inevitably there was widespread opposition to these laws, within both the black and the white community. As a consequence harsh security laws were enacted to stifle dissent. Habeas corpus was abolished and detention without trial became a regular feature of the legal process. Political organisations and newspapers were outlawed. Political meetings were prohibited. The Rule of Law was replaced with Rule *by* Law.¹³

IV. JUDGES AND APARTHEID

At about this time judges and lawyers abandoned their opposition to apartheid.

This was most marked in the response of the judiciary. The Appeal Court judges who had resisted apartheid in the 1950s had died or reached the mandatory retirement age of seventy. There were new judges on the Bench; all white, all male; some Afrikaans speaking, some English speaking; some educated in South Africa, some in the colleges of Oxford and Cambridge.

The courts, led by the Appeal Court, now acquiesced in the apartheid legal order. Ambiguous racist statutes were interpreted to give greater effect to the policy of apartheid. In one notorious decision the Appeal Court upheld the validity of delegated legislation zoning the city of Durban along racial lines in a blatantly unequal manner,¹⁴ despite the absence of any authority for unequal zoning in the enabling statute. Apartheid was a great social experiment, said the court, and it was not for the court to stand in its way. Soon after the same court, speaking through an Oxford graduate Judge of Appeal, intensified the hardships

11 *Ibid* pp 30-2, 316-18, 329-32.

12 *Ibid* Chapter 4.

13 *Ibid* Chapters 3, 5 and 6.

14 *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A).

of detention without trial by holding that a political detainee should be denied reading and writing material.¹⁵ The law was silent on this issue, but the court held that it was the unspoken intention of the legislature to create a harsh environment to enable evidence to be extracted from the detainee. Reading and writing materials would improve the detainee's lot and make it less easy to obtain a confession. It was therefore to be denied. The decision of the House of Lords in *Liversidge v Anderson*¹⁶ was invoked with approval. Decisions of this kind became the rule, displays of judicial independence the exception.

The reasons for this change of heart were varied. Some judges were National Party loyalists appointed to give their approval to apartheid. Some were conservatives committed to the defence of the status quo against political radicalism. Most were men appointed from the ranks of Queens Counsel whose experience had been in commercial law, and who had disdained political involvement. Most had been educated to believe that it was the task of the lawyer to apply the law and not to question it. For them the activism of the Warren Court in the United States at this time was incomprehensible; they felt more at home with the aloof and conservative English judiciary committed to the application of the law and not the pursuit of justice. They recalled the words of John Austin that lawyers should distinguish clearly between law as it is and law as it ought to be. Apartheid was the law and it was not for them to question it. Positivism became the pretext for judicial abstention.

The new judiciary took unkindly to academic criticism. A leading legal academic was prosecuted for and convicted of contempt of court for calling on judges to reject the evidence of detainees on the ground that it was obtained by intimidation and duress.¹⁷ Calls for judges to exercise their choice in favour of individual liberty were dismissed as displaying a lack of understanding of the judicial role. American judges, to whom the Constitution accorded political powers, might create law by choosing between competing interpretations. But not South African judges whose tasks was simply to apply, to declare the law - however evil it might be. Calls for judicial protest were ignored. Judges refused to become involved in the debate over human rights in South Africa. That was the concern of politicians, not lawyers.

This philosophy, generally, continued until the 1980s when there was a gradual judicial revolt against this approach to law.

V. THE RESPONSE OF LAWYERS

The response of the legal profession was not very different. This was the time of the emergence of the large solicitors firm, modelled on the giants of Wall Street. The needs of corporate clients left little time for defending people

15 *Rossouw v Sachs* 1964 (2) SA 551 (A).

16 [1941] AC 206.

17 *S v Van Niekerk* 1972 (3) SA 711 (A).

charged under the laws of apartheid. Besides corporate clients did not like to see their solicitors named in the press as defending opponents of the government. It was bad for business. In any event, most large commercial firms adopted the Wall Street philosophy that they did not handle criminal law work. Crime does not pay! And violation of the law of apartheid was a crime.

With this attitude it became increasingly difficult for persons charged under the laws of apartheid to find solicitors prepared to defend them. To make matters worse the few solicitors who were prepared to defend opponents of apartheid were detained, denied passports, subjected to personal restrictions or harassment. In the 1960s one could count the solicitors willing to handle political work in Johannesburg on one hand - with several fingers left over. To add insult to injury these lawyers were ridiculed by the large commercial law firms and denied the support of the law society.

The Bar was better. Some of the most prominent members of the Bar were still prepared to appear in political trials. But gradually there was a falling off in this attitude as it became clear that crime paid less than corporate - tax work.

The result was a strange one. South Africa had become notorious because of its legal system; a system that increasingly was likened to that of Nazi Germany or America during slavery. Yet the majority of South Africa lawyers knew little of the law of apartheid. They preferred to have nothing to do with it and instead concentrated on more lucrative fields of law. They chose not to see it as their responsibility. Whereas judges collaborated in the apartheid system by abstention, practising lawyers collaborated by avoidance. But like the judges, they believed that it was not the function of the lawyer to concern himself with law as it ought to be - that was the task of the politician. Again the creed of positivism prevailed.

The policy of abstention and avoidance pursued by the legal profession had a serious effect on the image of the law and lawyers. Lawyers became alienated from society. White judges had shown little sympathy for the plight of blacks in their judgments and white lawyers had - in effect - refused to make their services available to blacks, except where they engaged in commerce. It is not surprising therefore that lawyers were seen as part of the system. Their neutrality was seen as a statement of support for apartheid.

Let me digress a moment to mention that many, perhaps the majority, of lawyers claimed to be politically opposed to apartheid. Unfortunately they were unprepared to use their professional talents to oppose apartheid. In this respect they resembled judges in the United States, before the civil war, who denounced slavery on political platforms while upholding its law in court.¹⁸

The bleak period for the South Africa legal profession was in the 1960s and 1970s. In the 1980s there were a number of notable changes. Younger judges, particularly from the province of Natal, started to use their skills to minimise the impact of race and security laws. A human rights Bar developed as large sums of money came into the country for the defence of political prisoners. US

18 Note 4 *supra*.

foundations funded public interest law groups committed to promoting human rights. However, this had little impact on most solicitors and barristers who continued to keep their distance from human rights work.

The role of the Bar Councils and Law Societies representing the two branches of the legal profession also calls for comment. The Law Societies representing the solicitors vacillated between support for the National Party Government and neutrality until the 1980s. Most Bar Councils behaved little differently - although on occasions they did protest against laws denying habeas corpus. To make matters worse they took little action to assist black Africans to enter the profession, with the result that today less than five per cent of the legal profession is black - despite the fact that blacks comprise 70 per cent of the population of over 35 million.

Professional obstructionism was not limited to the entry of blacks into the profession. Both solicitors and advocates placed severe restrictions on public interest law firms devoted to anti-apartheid work. Compliance with professional rules was placed above opposition to apartheid.

VI. THE FUTURE

The performance of the South African legal profession during the apartheid years has resulted in demands for the reconstruction of the law, the judiciary and the legal profession in a post-apartheid society.

First, there is general agreement that the new constitution should include a Bill of Rights protecting at least civil and political rights. South Africans are determined that the law should not again become an instrument of oppression. The traditional view of Dicey that the common law and the notion of the Rule of Law provide greater protection than a Bill of Rights has been found to be wanting. The South African experience demonstrated very clearly that the common law offers little resistance to a Parliament committed to oppression. A Bill of Rights will not only provide a legislative shield against such a Parliament but it will also provide lawyers with the necessary legal weapons to resist oppression.¹⁹

Secondly, there is general agreement that the implementation of the Bill of Rights should not be left to the almost exclusively white, male judiciary modelled on the English judiciary in style and thought. Instead a constitutional court along US and European lines is envisaged that will be more representative of the people of South Africa and whose members will have a jurisprudential vision that reaches beyond the limits of Austinian positivism.

Thirdly, there are demands for fusion of the legal profession. The division of the profession has been seen as a factor that contributed to the alienation of the

19 J Dugard "A Bill of Rights for South Africa?" (1990) 23 *Cornell International Law Journal* 441; J Dugard "Towards a Democratic Order for South Africa" (1990) 2 *African Journal of International and Comparative Law* 361.

legal profession from society and to the failure of the legal profession to admit blacks in greater number during the apartheid years.

VII. LESSONS FOR OTHER COMMON LAW COUNTRIES

The title of my talk suggests that Australian lawyers may have something to learn from the South African experience. You may feel there is no substance in this suggestion - that South Africa's racial composition and history of racial bigotry are unique; or at least find no parallel in Australia. This is true. But there are two other truths that one should bear in mind. *First*, that history is unpredictable; and, *secondly*, that liberty cannot be taken for granted. It is not inconceivable that there may be a reversal of Australia's good fortune to be a society in which equality and personal liberty flourish. Multi-culturalism may turn sour and the majority may turn on the minorities. Or a political paranoia of the kind that gripped the USA in the McCarthy period may develop. History teaches us that anything is possible.

For this reason I believe it is necessary for lawyers to prepare themselves for the worst behaviour in human beings, for the most unlikely change in political life. The best way to do this I believe is to learn from the experience of other States and to shape one's institutions and prepare one's legal profession to cope with the worst scenarios.

This is not the place to revive the debate over a Bill of Rights for Australia. I am broadly familiar with the arguments raised against a Bill of Rights. They are easy to understand because they are substantially the same arguments that were raised in South Africa for 40 years by judges and National Party politicians against a Bill of Rights for South Africa. These arguments are based on the common law tradition, hostility to the US experience and the view that if society is tolerant it does not need a Bill of Rights and that if it is not, no Bill or Rights will preserve it. Arguments of this kind belong to a benevolent society and are best made by those in the privileged class. But they will find little support from the victims of injustice who look desperately to the law for their salvation. Dicey's benign Victorian views preceded the rise of 20th century authoritarianism. They have been discarded in Canada. They are about to be rejected in South Africa. If Australia is to arm itself against the possibility of political oppression it would be wise to reconsider the introduction of a Bill of Rights.

This year Australia signed the Optional Protocol to the International Covenant on Civil and Political Rights. It will now be possible for Australians to petition the Human Rights Committee in Geneva when their rights are violated. Although the powers of this Committee are weak, its political influence will be strong. Australia, a country committed to human rights will find it difficult to reject adverse decisions of the Human Rights Committee. I suspect that the external affairs power will increasingly be invoked to remedy

features of Australian law that violate international human rights standards. In these circumstances, does it make sense to continue without a Bill of Rights? Does Australia really want a situation in which its domestic law is regularly held to be in violation of its international obligations? In South Africa the discrepancy between domestic law and international was stark. Undoubtedly it contributed to the delegitimation of the legal system. Clearly Australia does not face such a bleak prospect. Nevertheless, discrepancies will emerge; human rights activists will turn to international law for help; domestic law will be denounced. Is this desirable? Isn't it wiser to enact the International Covenant on Civil and Political Rights into Australian law by a Bill of Rights to bring the two legal orders into line with each other?

I claim no expertise on the Australian legal profession. However, my superficial knowledge leads me to believe that structurally it differs little from that of South Africa. The large firm are preoccupied with commercial matters and do not handle criminal law work. This is a sure recipe for alienation from society, particularly in a multicultural society in which corporate control still rests largely in the hands of the established Anglo-Saxon majority. As for the controlling bodies of the legal profession, here too there is some evidence to suggest that they may on occasion place their own traditions and professional needs above the public good.

Finally there is the important issue of jurisprudential outlook. According to Gaze and Jones' *Law, Liberty and Australian Democracy* (1990), the views of Bentham and Austin have "had a lasting impact on Australian law and legal thinking". So it was with South Africa.²⁰ The tenets that law is a command for lawyers to obey without question and that a clear separation must be maintained at all times between law and morals emasculated the South Africa judiciary and legal profession. As it did the German legal profession in the 1930s;²¹ and the American judiciary in the slavery period.²² If the Australian legal profession is to ensure that it does not fail the nation in a time of crisis it is important that its lawyers be educated in a different tradition - one in which the supremacy of the values of equality and personal freedom replace the supremacy of the law. To me it seems that this new philosophy now prevails in most Australian law schools, particularly NSW. In time this new way of thinking about law may provide the greatest bastion against oppression.

Apartheid provides a sad, but instructive insight into the strengths and weaknesses of the laws, institutions and traditions we have inherited from England. They have their undoubted strengths, but may not necessarily have the strength to resist evil. I hope that you, in Australia, are never called upon to experience this.

20 Note 10 *supra* pp 393-7.

21 Lon L Fuller "Positivism and Fidelity to Law - a Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630 at 659.

22 Note 4 *supra* pp 235.