

BOOK
REVIEW

John Dugard: Confronting Apartheid

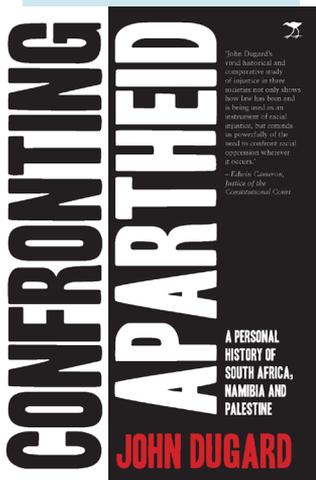
DENNIS DAVIS is a serving Judge of the High Court of South Africa. He was a member of the Commission of Enquiry into Tax Structure of South Africa (the Katz Commission) and Technical Advisor to the Constitutional Assembly where the negotiations for South Africa's interim and final constitutions were formulated and concluded. Since his appointment to the Bench in 1998, he has continued to teach constitutional law and tax law at the University of Cape Town, where he is an Honorary Professor of law.

John Dugard is a legal hero to many, myself included. Back in the day when most academics and anyone else in the legal community was covered into submission and silence by the repressive apartheid regime, it was Dugard as well as Barend Van Niekerk, before his untimely death, and Tony Matthews, who stood up to be counted. But for sheer consistency and doggedness, Dugard was exceptional. Apart from the many speeches and lectures he gave in defense of democracy and the rule of law over almost 30 years before the end of apartheid, he wrote the most luminous and eloquent account of the abuse of law by the apartheid regime in 1978, *Human Rights and the South African Legal Order* – still the finest work of its kind.

He has now written a new book entitled *Confronting Apartheid*, in which he looks back without anger but with great perspicacity at a career which extends over some 50 years. Dugard, South Africa's most eminent international law scholar (for which reason alone, although there were many other compelling ones, he should have been appointed to the first Constitutional Court) began his academic career by writing on the South West Africa (SWA) problem in the 1960's. In this book, he reflects on a 1966 article in which he took the World Court to task for its split decision in favour of South Africa, when it found that the applicants who had argued that South Africa's claim to SWA had no basis in law and did not have standing to bring the case. Dugard sought to publish his article in the *South African Law Journal*, then edited by Prof Bobby Hahlo of Wits Law School. Hahlo demanded that Dugard rewrite the article and praise the World Court. Although a junior academic at WITS at that time, Dugard refused to be intimidated by Hahlo, saying that he would publish in a foreign journal with an explanation as to why it had been refused in South Africa. Hahlo caved in, although Dugard generously writes that Hahlo and his deputy editor at the time, Ellison Kahn, were men of integrity who were finally dictated to by their consciences (27).

The book moves on to Dugard's speaking out against the apartheid regime. He writes about his famous 1971 inaugural lecture, in which he contended that South African judges had to come to terms with their unconscious bias and cure their deference to the government by employing basic natural law principles which were immanent in the Roman Dutch common law. By effectively criticising the judiciary's almost blind acceptance of the most constrained version of legal positivism, Dugard had thrown down a serious jurisprudential challenge to the judiciary. In his book, Dugard records how the then Chief Justice, Lukas Steyn, at a farewell occasion, took the opportunity to lambast an 'unnamed academic' for suggesting that judges were guided by inarticulate premises which favoured the executive. Steyn said that the judges had considered laying charges against this academic but that he (Dugard) had been very smart in not suggesting that the judges had deliberately favoured the executive in security-related cases (53).

Two implications struck me when I read this section of the book: It is truly sad that there is not one legal academic today who is prepared to show even 10% of the courage that Dugard exhibited in far more dangerous times (Pierre de Vos in his columns may be the one exception). It is regrettable that the legacy of speaking truth to power, which Dugard developed, has now been ignored by the academy. The second implication is



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that the theory of adjudication developed by Dugard in his 1971 lecture took place at around the time that Ronald Dworkin at Oxford had begun to write in a similar vein, about judges seeking to be guided by legal principles found at the root of the legal system. Dworkin is widely regarded as one of the most influential legal theorists of the 20th century; hence the added praise that should be given to Dugard's lecture.

The book documents the creation of the Legal Resources Centre (LRC) and the Centre for Applied Legal Studies (CALs) in the late 1970's. Dugard says that the initial idea was that there would be a collaborative partnership between the LRC and CALs, but that the organised legal profession was prepared to waive rules of practice relating to access to clients, attorneys and advocates working together in respect of the LRC but not for CALs. As the founding director of CALs, Dugard initially created a center which undertook serious research into legal issues of public interest as well as public education. But, as the book documents, as the years rolled on, CALs was heavily involved in hugely significant litigation in favour of labour rights in support of the new labour movement which eventually became COSATU. CALs exposed detention and torture, particularly through the so called "Wendy Orr case", land removals and litigating against censorship. To his great credit, Dugard recruited some of the most outstanding lawyers produced in this country, all of whom became very prominent in the legal community – Halton Cheadle, Edwin Cameron, Nicholas (Fink) Haysom, Clive Thompson, Gilbert Marcus and Paul Benjamin.

These lawyers were the critical litigators in the many cases brought by CALs. Although each is mentioned very positively by Dugard, I felt it a pity that he did not pen a whole chapter on what they – at the time young lawyers – achieved. While the work of the LRC under the leadership of Arthur Chaskalson has been justly heralded for its monumental contribution to ensuring that millions of people obtained some rights, less has been said about the record of CALs. Dugard should be very proud of his achievement in giving these talented lawyers the support and space to use the law as both a shield and sword against the apartheid regime. Hence, I would have preferred if he had devoted more space in his book to the legal struggles waged by this exceptional group, as well as the legal victories of their clients.

The section of the book dealing with the Israel-Palestine conflict is arguably the most compelling section. In less than 100 pages, Dugard provides a sustained analysis of a most complex political problem. He writes from the vantage point of having been the Special Rapporteur on human rights in occupied Palestine, a position to which he was appointed in 2001.

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Turning to the occupied territories, Dugard refers to the definition of apartheid in international law, particularly the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the 1998 Rome Statute of the International

Court of Justice. In terms thereof, apartheid, which Dugard cautions is a label that should not be used lightly without compelling justification, requires that three conditions be met: 1) the presence of different racial groups; 2) the commission of certain inhuman acts; and 3) these acts must have been committed for the purpose of establishing domination by one racial group over another and systematically oppressing that group. As he notes, it is conditions 2 and 3 which are hotly contested. The book contains separate chapters dealing with these two conditions.

Dugard justifies the conclusion that the second condition has been met, in that there is clear and sustained evidence, in his view, of extrajudicial execution of protestors and militants not participating in hostilities; indiscriminate killing of civilians in the bombing of civilian neighborhoods; the imprisonment of some 6000 Palestinians each year by military courts that fail to comply with international fair trial standards; arbitrary detentions of thousands of so-called administrative detainees held for long periods without trial; and denial of freedom of movement by way of checkpoints, the wall and separate roads (212-216). In addition, there is widespread practice of house demolitions 'which leave innocent children, the elderly men and women on the streets ruined and shamed' (217).

Turning to the third condition, he writes 'the primary function of the Israeli civil and military authorities in the OPT (occupied territories) is to insulate and privilege Jewish settlers and to ensure that Palestinians intrude as little as possible on the lives of the settlers' (230). In support of the empirical evidence, Dugard cites the brave Israeli human rights lawyer, Michael Sfard, as follows: 'Israel has created not only occupation that has persisted for generations but also a regime where one group oppresses and discriminates against the other for the sole purpose of preserving its control and supremacy' (231). Tellingly, Dugard notes that, unlike Israel in the OPT, even the South African regime during its apartheid rule established schools, universities, hospitals and social services as well as some industrial development in the Bantustans.

The critics of this line of argument generally raise two defenses: 1) why pick on Israel for its policies in the OPT when there are so many more oppressive regimes, especially in the Middle East?; and 2) related thereto, those who argue, like Dugard, are anti-Semites, and if they are Jews, then they must be self-hating Jews. Regarding the first point, the response which is contained in this book is that 'unlike South Africa, which had refused to sign any human rights treaty and denied that it was bound by human rights law, Israel is a party to all major human rights and humanitarian law treaties and professes to be an adherent of international human rights law' (207). In short, having claimed to adhere to these standards unlike repressive dictatorships, Israel stands to be judged by these same standards. That is not to give repressive regimes a free pass – ironically the policy of the Trump administration, which is the most uncritical supporter of the current Israeli government. It is to hold Israel to the standard that it has chosen.

But can it be argued, because Dugard has concentrated on this area, even in the light that he was Special Rapporteur, that he is fueled by malice? That, as he documents, is the kind of treatment that he and others like him have received. Correctly, he notes that this label is painful, however hugely unfair it is. This kind of criticism arises when no rational response to the kind of careful case made out by Dugard can be developed. However, as he notes, it has the effect of silencing many who are not as tenacious and brave as is Dugard. In this connection, he refers to the retraction, in an op-ed by Judge Richard Goldstone, of significant parts of the Goldstone Report on the Gaza Conflict. In this connection he writes '[W]hy Richard wrote the op-ed remains a mystery. We can only speculate as to what caused him to take such an unprecedented step. However as one who himself was subjected to vilification by the pro-Israeli lobby. I suspect that intense pressure was brought on him to recant' (254).

Dugard ends his book by pointing out that, for those like him who steadfastly opposed apartheid, the dawn of South African democracy was a miracle. He then writes that as the contested land between the Mediterranean and the Jordan River is the land of miracles, a similar miracle will happen and a settlement that does justice to all the competing parties will be found.

The entire book repays careful reading, as it records so much of interest about the struggle history in Namibia and South Africa. But the last section on Palestine/ Israel is the one which should be read by all concerned about this area of the world and hopefully debated with the care and rationality exhibited by the author.