JUDGES AND INJUSTICE*

The judge is the prototypical legal institution. In his robed and exalted independence he is the very apotheosis of fairness. The 'social service' that he renders to the community is, in Lord Devlin's words, 'the removal of a sense of injustice'.[1] The impartiality that informs his judgments in the settlement of disputes is nothing short of an article of faith in a free and just society.

While this attractive and abiding conception of the judicial function has long been exposed as, at best, a myth, no amount of cynicism can easily dislodge the image of the judge as keeper of the law, protector and repository of justice.[2] Indeed, were it not the case that judges themselves readily ascribe such a designation to the office they hold, there would be little point in pursuing the question I shall pose in a moment. Nor is this to deny, as the American realists demonstrated, that judges are not untainted by personal predilections or political predispositions.[3] Judges, it would seem, are human. Yet occasionally there is heard the proposition that to identify judicial frailty is, in some sense, subversive, 'as if judges', as the great judge Cardozo put it, 'must lose respect and confidence by the reminder that they are subject to human limitations'.[4] Searching analysis of the judiciary characterized the career of my distinguished predecessor. The late Professor Barend van Niekerk's indefatigable and intrepid campaign against what he conceived to be unfair is an inspiration not only to lawyers but to all who share a sense of injustice.[5]

* Inaugural lecture as Professor of Law in and Head of the Department of Public Law of the University of Natal, Durban, delivered on 23 March 1983.

Save for the correction of a few infelicities of style, I have resisted the temptation to amend the text. Nor have I responded to the criticism that has been voiced; I hope that I shall have the opportunity to do so in the future. [See 'Judging Judges: A Brief Rejoinder to Professor Dugard' below 295—Editor.]

[1] 'Judges and Lawmakers' (1976) 39 *Modern LR* 1 at 3.

[2] An interesting account of the American realist movement is to be found in Alan Hunt *The Sociological Movement in Law* (1978) ch 2. See too William Twining *Karl Llewellyn and the Realist Movement* (1973).

[3] American accounts of the 'inarticulate' judicial predisposition are, of course, legion. For a provocative assessment of the English judge, see J A G Griffith *The Politics of the Judiciary* 2 ed (1981).

[4] *The Nature of the Judicial Process* (1921) 168.

[5] See the moving tribute by Ellison Kahn in (1981) 98 *SALJ* 402. Barend van Niekerk's analysis of capital punishment in South Africa, '. . . Hanged by the Neck Until You are Dead' (1969) 86 *SALJ* 457, (1970) 87 *SALJ* 60, culminated, of course, in *S v Van Niekerk* 1970 (3) SA 655 (T) and the author's acquittal on a charge of contempt of court. See J R L Milton 'A Cloistered Virtue' (1970) 87 *SALJ* 424. A further prosecution for contempt and attempting to defeat or obstruct the course of justice followed a speech in which he urged judges to reject evidence of detainees obtained while they were in solitary confinement; see *S v Van Niekerk* 1972

Judges, whatever the extent of their 'independence', belong, of course, to a legal system, and it requires little sophistication to perceive that, in maintaining itself, any social order requires a judiciary to support its laws. Nor should we be surprised to discover that the notion of judicial 'independence' is employed to lend legitimacy to the legal order: the ostensible differentiation between legislation and adjudication is one of the celebrated hallmarks of a so-called democratic society. South Africa is manifestly not such a society, and it is therefore inevitable that, at least in respect of its powers, the judiciary will not conform to a model which might be more appropriate to an essentially democratic, or even just, society. Yet, in the work of liberal critics of the South African judges, notably Professor John Dugard[6] and Professor Anthony S Mathews,[7] this perspective is pervasive and has important consequences for their account of the legal order and, hence, of their expectations of the judicial function within it. Nor do these writers, by adhering to a positivist account of the process of adjudication, provide a satisfactory analysis of the business of judging per se.

It will be one of my arguments that, prior to our prescribing how judges might confront unjust laws (or assaults on their jurisdiction), we need to ensure that our conception of both the judicial process and the legal system accords, as far as possible, with reality. This is a tall order, and within the limited time available to me tonight I can hope to provide only the essentials of my case. Nor can I hope to consider the notoriously controversial and difficult question of the nature of justice itself: whether utilitarianism, for example, gives an adequate account of the concept of justice, or whether the natural-law tradition or even social-contract theory provides a better foundation.[8] This is patently an important prerequisite to a discussion of injustice, but I shall have to content myself with certain assumptions, at least about the essentials of a just or unjust legal order.

The Moral Question

The stark question that I wish to pose is: What ought a judge to do who finds the law morally indefensible? But this apparently simple question conceals a number of embarrassing issues. First, what is he

(3) SA 711 (A); John Dugard (1972) 89 *SALJ* 271. A third trial—an action for defamation—arose out of remarks Professor Van Niekerk had uttered in respect of the judiciary and sentencing policy: *South African Associated Newspapers Ltd and another v Estate Pelser* 1975 (4) SA 797 (A). See S Kentridge 'Telling the Truth About Law' (1982) 99 *SALJ* 648 at 652.

[6] See, in particular, *Human Rights and the South African Legal Order* (1978); 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *SALJ* 181; 'Some Realism About the Judicial Process and Positivism—A Reply' (1981) 98 *SALJ* 372.

[7] *Law, Order and Liberty in South Africa* (1971).

[8] A useful collection of essays is to be found in E Kamenka and A Erh-Soon Tay (eds) *Justice* (1979). Modern utilitarians are thin on the ground, but see W Ivor Jennings 'A Plea for Utilitarianism' (1938) 2 *Modern LR* 22; C Edwin Baker 'Utility and Rights: Two Justifications for State Action Increasing Equality' (1974) 84 *Yale LJ* 39; Brandt 'Toward a Credible Form of Utilitarianism' in H Castenada and G Nakhnikian (eds) *Morality and the Language of Conduct*

doing in such a system? Might it not be thought to suggest that his appointment to the bench of an unjust legal order constitutes acquiescence to the laws which he now, ex hypothesi, purports to find unjust? Is he not, in other words, trapped in a vicious circle? The oath taken by a judge on appointment declares that he will, in his capacity as a judge of the Supreme Court of South Africa, 'administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa . . .'.[9] It is, of course, the very fact that to 'administer justice . . . in accordance with the law and customs of the Republic of South Africa' constitutes a contradiction in terms that provides our judge with his moral dilemma. But how has such a dilemma arisen in the first place, for, as a matter of historical fact, it is plain that though the constituent parts of the unjust legal order might have changed since his appointment, no existing member of the judiciary could claim that the essential injustice of the system was absent at that time? Yet this is to beg several questions, not least of which is the possibility of the judge's own moral conversion and, in consequence, the appearance of a dilemma where none existed before. A point may be reached, for instance, where he can no longer countenance the exclusion of the court's jurisdiction over matters involving civil liberties. Already, of course, the courts have been deprived of powers to 'administer justice' in respect of, for example, indefinite detentions and bannings under the Internal Security Act 1982.[10] Suppose our judge finds this exclusion of his jurisdiction to be unacceptable. He will have some difficulty in squaring this new disapprobation with the strict terms of his oath (for it speaks of administering justice *in accordance with* the law, and the new constraints on his authority cannot morally be distinguished from the existing ones), but let us suppose that, notwithstanding the niceties of this distinction, he is unable to reconcile his function as repository of justice with statutes which mock that very role. We must, I think, allow that his oath is no barrier to his real moral quandary.

Secondly, is it not arguable that (whatever view he holds about his oath) our judge, by simple virtue of his position, is part of the very system which he now stigmatizes as unjust? His objection therefore has him imprisoned within a hall of mirrors. To take an extreme

(1963) 107. No account of the natural-law tradition can now afford to ignore John Finnis's *Natural Law and Natural Rights* (1980). The reawakening of social contract theory is, of course, attributable to John Rawls's *A Theory of Justice* (1972), on which there are three excellent commentaries: B M Barry *The Liberal Theory of Justice* (1973); Norman Daniels (ed) *Reading Rawls: Critical Studies of Rawls' A Theory of Justice* (1975); Robert Paul Wolff *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice* (1977).

[9] The Supreme Court Act 59 of 1959 s 10(2)*(a)*.

[10] Act 74 of 1982 s 29. The Act is a 'rationalization' and, in certain respects, an 'improvement' of pre-existing legislation. It is largely based on the recommendations of the 'Rabie Report', *Die Verslag van die Kommissie van Ondersoek na Veiligheidswetgewing* RP 90/1981.

example: Suppose that I am appointed to act as referee in a cock-fighting match. The moral disquiet I might feel about the cruelty of the sport will hardly avail me when I seek to justify my role in the match. Again, I think we must allow our judge to exercise some moral choice, for to do otherwise would be to surrender to the crude view that all judges are *equally* agents of injustice. And to accept this proposition renders stillborn any attempt to evaluate the performances of individual judges. Many lawyers appear to have little difficulty in judging, say, Steyn CJ to have been a weak defender of liberty[11] and, say, Schreiner JA a zealous one.[12] They both acted as referees to the cockfight, yet each interpreted his function differently. But some would urge that since the law is unjust, the legal system and all who administer or maintain it—judges, magistrates, lawyers, and even teachers of the law—are tainted by its injustice. Is it not, then, legitimate to indict all with the general charge that they are cogs in the machine of injustice? This argument, it seems to me, is essentially specious and misconceived. It runs counter to our habitual tendency to distinguish morally between the behaviour of those whom we encounter every day. A comprehensive denunciation of this kind, though it has its obvious appeal to the rabble-rouser, invites us to abandon our efforts to differentiate good from evil and, hence, to accept the facile, and ultimately hypocritical, proposition that since anything done simply maintains the system, therefore nothing should be done. This is a weak argument. It seems to me that we can and do draw moral distinctions and judges, as guardians of justice, are, if anything, more rather than less susceptible to such judgments.

Thirdly, though my concern is with South Africa and its quintessentially unjust legal order, we must allow that a judge may himself not characterize it as such. He may, in other words, find my cockfighting model offensive. To such a judge, of course, there arises no moral dilemma of the kind I am seeking to examine tonight. May we therefore safely exclude him from general consideration? I think not. There may, even for such a judge, come a time when a particular legislative enactment strikes him as unjust. He may, for instance, find nothing immoral in a legal system that accords rights on the basis of pigment, but consider a certain tax law unfair. His dilemma is, I think, for all its mundaneness, no less real than that faced by the judge who cannot reconcile his office with the apartheid order or the destruction of human liberty. Yet, though we should not belittle his predicament, it raises questions that are different from the one I am

[11] See Edwin Cameron 'Legal Chauvinism, Executive-mindedness and Justice—L C Steyn's Impact on South African Law' (1982) 99 *SALJ* 38. Cf David Dyzenhaus 'L C Steyn in Perspective' (1982) 99 *SALJ* 380.

[12] See Ellison Kahn 'Oliver Deneys Schreiner: A South African' in Ellison Kahn (ed) *Fiat Justitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 1 and 'Oliver Deneys Schreiner—The Man and his Judicial World' (1980) 97 *SALJ* 566.

posing. I hope, however, that in attempting to address the one I shall incidentally consider the other.

The Judicial Function

Implicit in the question of the moral dilemma of the South African judge is a model of the judicial function. The orthodox positivist model, to which Dugard and Mathews, in this respect, adhere, posits law as a system of rules; where there is no applicable rule or there is a penumbra of ambiguity or uncertainty, the judge has a discretion to fill in the gaps in the law.[13] And it is the principal charge laid by these writers against the members of the judiciary that they have, in the main, failed to exercise this discretion in favour of the essentially libertarian principles of the Roman-Dutch common law. I shall consider later how a system universally stigmatized as unjust comes to have a veritable charter of human rights at its heart (and I shall suggest that this is a misdescription of the South African legal system), but I want first to challenge the thesis that judges have a real discretion in deciding cases before them. Such a challenge is no longer particularly controversial; indeed, the views of its chief proponent, Professor Ronald Dworkin, Professor of Jurisprudence at Oxford, show every sign of becoming the new orthodoxy.[14]

Positivist assumptions concerning the judicial process have, in the light of Dworkin's assault on the model of rules, had to be re-evaluated, if not altogether abandoned. Although its prime target is Professor H L A Hart's account of law as a system of rules, Dworkin's attack extends beyond Hart's positivism and calls into question the very nature of adjudication and its role in the protection of individual rights. Nor is his thesis merely descriptive; he claims for it as well a normative aspect that 'offers a political justification for [the structure of the institution of adjudication]'.[15]

The theory is both sophisticated and complex. For present purposes, however, it will be necessary to outline only its essential features. Its mainspring is the denial that law consists exclusively of rules. In addition to rules (which 'are applicable in an all-or-nothing fashion'), there are non-rule standards: 'principles' and 'policies', which, unlike rules, have 'the dimension of weight or importance'.

A 'principle' is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation . . ., but

[13] See H L A Hart *The Concept of Law* (1961) ch 7.

[14] See *Taking Rights Seriously* (1977; new impression 1978), cited hereafter as Dworkin. A symposium on Dworkin's 'rights thesis' is to be found in (1977) 11 *Georgia LR* (though no South African law library appears to hold this journal!); see too Kent Greenawalt 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Columbia LR* 359; Marshall 'Positivism, Adjudication and Democracy' in P M S Hacker and J Raz (eds) *Law, Morality and Society* (1977); Neil MacCormick *Legal Reasoning and Legal Theory* (1978) ch 9; Allan C Hutchinson and John N Wakefield 'A Hard Look at "Hard Cases": The Nightmare of a Noble Dreamer' (1982) 2 *Oxford J of Legal Studies* 86.

[15] Dworkin 123.

because it is a requirement of justice or fairness or some other dimension of morality'.[16] A 'policy', on the other hand, is 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community'.[17] But Dworkin rejects any 'rule of recognition' by which such non-rule standards are admitted to the legal system, for such standards 'are controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle. Even if we succeeded, we would not have a key for law because there would be nothing left for our key to unlock.'[18]

It is when there is no immediately applicable rule or where 'no settled rule dictates a decision either way'[19] that the judge is called upon to weigh competing principles, which are no less part of the law for their not being rules. In such 'hard cases', since a judge is not expected to resort to his personal preference in arriving at a decision, he has, contrary to the positivist view, no real discretion.[20] There is always one right answer, and it is the judge's task to find it (in 'hard cases') by weighing competing principles and determining the rights of the parties in the case before him. This is no mean task, and one to which Dworkin has appointed the omniscient Hercules J, 'a lawyer of superhuman skill, learning, patience and acumen'.[21] Hercules is expected to 'construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well'.[22] Where the legal materials allow for more than one consistent reconstruction, Hercules will decide on the theory of law and justice which best coheres with the 'institutional history' of his community.

Although it is haunted by the spectre of Blackstone, this model of adjudication has an obvious appeal to democratic theory: judges do not legislate—they merely enforce those rights that have in the main already been enacted by a representative legislature. Indeed, Dworkin's thesis springs from a concern to 'define and defend a liberal theory of law'[23] and, in contradistinction to the positivists, to 'take rights seriously'.

[16] Dworkin 22.
[17] Ibid.
[18] Dworkin 44.
[19] Dworkin 83. The determination of what is a 'hard case' is, for Dworkin, not an especially difficult problem, but see Hutchinson and Wakefield op cit for the argument that '[o]n his own terms, Dworkin is committed to the view that all cases are "hard cases"' (at 100).
[20] Dworkin acknowledges that a judge has discretion in a 'weak sense': when his decision is final, and when he must use judgment to decide a case; Dworkin 31–3. For a perspicacious attempt to illuminate the various meanings of 'discretion', see Barry Hofmaster 'Understanding Judicial Discretion' (1982) 1 *Law and Philosophy* 21.
[21] Dworkin 105.
[22] Dworkin 116–17.
[23] Dworkin vii.

This image—Hart has described it as a 'noble dream'[24]—is a far cry from the picture of the judge presented by South African writers such as Dugard. For Dugard, judges exercise a very real discretion, and it is their failure to choose an interpretation which accords with the principles of liberty or justice that is his principal charge against the judges. Thus Dugard concludes:

> 'On numerous occasions, on matters of basic political importance, the courts have chosen a course which has either coincided with or run counter to Government policy. The process of choice here is not as unrestrained as it is in a political forum, but is confined by existing precedents, authorities, traditions, norms, and rules. Nonetheless it is still a choice. And as it has confirmed or contradicted Government policy and has, inevitably, been influenced by such policy, it can correctly be categorized as a policy choice.'[25]

This is an expression of the classic positivist account of the judicial role.

Which model better describes reality? This is not merely a doctrinal exercise, since, if judges do lack any real discretion, then our analysis of the judge in an unjust legal order may be affected. And, on a normative level, we may beg leave to question whether, in such a legal order, liberty is, indeed, more assiduously safeguarded by the Herculean mode. To test the Dworkin model in a South African context is an enterprise that is bedevilled by certain significant problems. First, it will already have been perceived that it is primarily an argument from democracy; Dworkin's concern to eliminate strong judicial discretion is premissed on the offensiveness of judges—unelected officials unanswerable to the electorate—wielding legislative or quasi-legislative power. This argument has an embarrassingly hollow ring in South Africa. The imposition of law upon a disfranchised majority who can change neither the law nor the lawmaker renders any misgivings about the untrammelled power (real or putative) of an unelected judiciary palpably small fry. Secondly, in reaching his decision in a hard case, Hercules J is expected to find the uniquely correct answer by reference to the 'community's morality' and thereby to give effect to individual rights. Such an approach in South Africa is more likely to be destructive of rights than to be protective of them.

Thirdly, Dworkin argues that judicial decisions in civil cases characteristically are (and ought to be) generated by principle rather than policy. The judge, since he does not legislate, may not legitimately have recourse to policy considerations. It would plainly be folly to suggest that judges do not take account—explictly or implicitly—of policy. But when they do, Dworkin asks us to read such appeals to policy as, in effect, statements about rights, that is, references to principles:

[24] H L A Hart 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' (1977) 11 *Georgia LR* 969.

[25] *Human Rights and the South African Legal Order* 367.

'If a judge appeals to public safety or the scarcity of some vital resource, for example, as a ground for limiting some abstract right, then his appeal might be understood as an appeal to the competing rights of those whose security will be sacrificed, or whose just share of that resource will be threatened if the abstract right is made concrete.'[26]

This 'substitutability' of arguments of principle and arguments of policy is a further dimension of Dworkin's justification of adjudication by unelected officials—a preoccupation more genuinely held in an elective democracy. There is, nevertheless, an undeniable proclivity amongst South African judges to invoke, for example, what may broadly be called apartheid, in order to justify a decision in a hard case dealing with race laws. Apartheid, on Dworkin's account, is manifestly a 'policy' (though he does, on occasion, suggest that policies advance 'some overall benefit for the community as a whole', a description hardly apposite here), but we are to understand such references as an appeal to the competing rights of the parties to the dispute (that is, a reference to 'principles'). But yet again the assumptions about an essentially just legal system obtrude. For Dworkin a 'principle' is fundamentally a standard which is a 'requirement of justice or fairness or some other dimension of morality'.[27] Legal principles, in other words, 'must be moral principles'.[28] Dworkin is, however, by no means clear about this, referring occasionally to principles which are 'morally defective',[29] 'unattractive',[30] 'very nasty',[31] and recognizing that there 'is no persuasive analysis . . . that insures that the principle that blacks are less worthy of concern than whites can be rejected as not a principle at all'.[32] But his conclusions in respect of the position of a judge in a 'wicked legal system' (which I shall consider in a moment) dispel to some extent the uncertainty as to whether the policy of apartheid, and the principles, however unjust, that are deployed in adjudication, are indeed susceptible of Dworkin's general typology.[33] References, then, by judges to the 'policy' or 'principle' of racial discrimination (or 'national security') are, of course, contrary to Dworkin's expectation, more likely to be destructive of rights than to be protective of them.

How might Hercules J (or perhaps Hercules JA) fare on the South African bench? Extraordinarily well, it would seem. In a series of 'hard cases', which are precisely those condemned by liberal lawyers, especially Dugard,[34] the judgments of the courts (or, in some cases,

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[26] Dworkin 100.
[27] Dworkin 22.
[28] Dworkin 343.
[29] Dworkin 339.
[30] Dworkin 342.
[31] Dworkin 341.
[32] Dworkin 343.
[33] But residual doubts remain. It cannot be denied (as several British critics have been quick to note) that Dworkin's orientation is, in many respects, a distinctly American one, located in the tradition of a Supreme Court vested with considerable 'political' power. The application of the thesis to other legal systems must (despite Dworkin's confidence) be treated with caution.
[34] See references cited in note 6 above.

the majority of the members of the particular court) are textbook examples of Hercules in action. In the seminal decision of *Moller v Keimoes School Committee*,[35] for instance, a decision of the Appellate Division in 1911, the court held that although the relevant statute[36] did not require school segregation on racial grounds (it spoke instead of 'origin'), such segregation was legally permissible. Lord De Villiers CJ looked to 'the political morality presupposed by the laws and institutions of the community'[37] and declared:

> 'As a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. . . . Believing, as these whites did, that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilization, they condemned intermarriage or illicit intercourse between persons of the two races. . . . These prepossessions, or, as many might term them, these prejudices, have never died out, and are not less deeply rooted at the present day among the Europeans in South Africa. . . . We may not from a philosophical or humanitarian point of view be able to approve this prevalent sentiment, but we cannot, as judges, who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature to adopt the policy of separate education for European and non-European children.'[38]

Similarly, in another locus classicus of racial segregation and an archetypal 'hard case',[39] the statute in issue was silent on whether the Postmaster-General could establish racially segregated post offices. The Appellate Division (by three judges to one judge) held that such discrimination not only accorded with the history of the Transvaal,[40] but also with 'accepted principle and good sense'.[41] As Beyers JA put it:

> 'Die verklaring dat in die oë van die wet almal gelyk is, kan nie onvoorwaardelik aanvaar word nie. Dit is ongetwyfeld onderhewig aan beduidende kwalifikasies; en wat die Transvaal betref, staan dit vas dat Europeane en Nie-Europeane in belangrike opsigte nog nooit in die oë van die wet gelyk was nie.'[42]

Equally, in a long catalogue of decisions dealing with the security laws, the courts have, in several 'hard cases', based themselves on principles that make short shrift of individual rights. A striking illustration is the Appellate Division's decision in *Rossouw v Sachs*[43] that a detainee under the then prevailing 90-day detention law[44]

[35] 1911 AD 635.
[36] The School Board Act 35 of 1905 (Cape).
[37] Dworkin 126. [38] 1911 AD 635 at 643–4.
[39] *Minister of Posts and Telegraphs v Rasool* 1934 AD 167.
[40] 1934 AD 167 at 177, per Beyers JA.
[41] 1934 AD 167 at 175, per Stratford ACJ.
[42] 1934 AD 167 at 177.
[43] 1964 (2) SA 551 (A). See too *Sachs v Minister of Justice* 1934 AD 11; *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A); *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A); *S v Naude* 1975 (1) SA 681 (A); *Minister van Justisie v Alexander* 1975 (4) SA 530 (A); *S v Laurence* 1975 (4) SA 825 (A); *S v Wood* 1976 (1) SA 703 (A); *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A); *S v Adams; S v Werner* 1981 (1) SA 187 (A). For penetrating analysis of these decisions of the Appellate Division, see Dugard *Human Rights and the South African Legal Order* ch 10 and 'Some Realism About the Judicial Process and Positivism—A Reply' (1981) 98 *SALJ* 372 at 383–7.
[44] Section 17 of the General Law Amendment Act 37 of 1963.

could, though the statute was silent on the point, be deprived of reading and writing materials. In his judgment, Ogilvie Thompson JA weighed two competing principles: the principle that statutes infringing individual liberty be restrictively interpreted, on the one hand, and the principle that the interest of the individual must sometimes yield to the public interest, on the other. The learned judge of appeal had little difficulty in giving primacy to the latter 'in the light of the circumstances whereunder it [s 17] was enacted and the general policy . . . of the section'.[45] Such circumstances were that 'subversive activities of various kinds directed against public order and the safety of the state are by no means unknown'.[46]

But does this not constitute an impeccable Herculean approach? Are these judges not identifying 'a particular conception of community morality as decisive of legal issues'?[47] In each case (as indeed in all cases) there is, according to Dworkin, only one uniquely correct decision. It is difficult to avoid the conclusion that in these judgments the courts arrived at the 'right' decision. Nor is there reason to doubt Dworkin's account that judges, in reaching the right decision, lack discretion in the strong sense of that term. But this leaves two questions unanswered.

First, how is one to explain the decisions (and, of course, the dissenting judgments) that went the other way? Secondly, how satisfactory is the model when applied to an unjust legal order? If the principle of, say, racial discrimination was already immanent in the law—to which 'institutional history'[48] bears adequate testimony—how is it that during the 1950s, in a number of judgments, the Appellate Division upheld the 'separate but not substantially unequal' doctrine?[49] How is it, in other words, that institutional history, in the passage of so short a time, could be read in so radically different a fashion when, if anything, the forces of white supremacy had little ground left to gain? The answer to the first question suggests an answer to the second. 'Community morality' had not changed—the judges had: '[t]he courts of this time were . . . largely manned by judges out of sympathy with the new regime and its racial policy.'[50] In consequence, therefore, those judges who, in their judgments (or, when in the minority, in their dissents), found that racial segregation was 'manifestly unjust or oppressive',[51] that white public opinion was not conclusive of the question of the legitimacy of separate racial facilities,[52] or who, like Gardiner AJA in his dissenting judgment in

[45] 1964 (2) SA 551 at 564 and 565.
[46] 1964 (2) SA 551 at 563.
[47] Dworkin 126.
[48] Dworkin 101–10.
[49] See *R v Abdurahman* 1950 (3) SA 136 (A); *Tayob v Ermelo Local Road Transportation Board* 1951 (4) SA 440 (A); *R v Lusu* 1953 (2) SA 484 (A).
[50] Dugard *Human Rights and the South African Legal Order* 317.
[51] *R v Carelse* 1943 CPD 242 at 253.
[52] *Tayob v Ermelo Local Road Transportation Board* 1951 (4) SA 440 (A) at 446.

Rasool,[53] declared that 'it is a fundamental principle of our law that in the eyes of the law all men are equal',[54] were not reporting accurately on the law.

To those, like Dugard, who cling to the view that essentially libertarian principles infuse the common law, there is no question of fiction. The 'value system upon which the South African legal system is founded'[55] is identified by Dugard as incorporating

> 'freedom from arbitrary arrest and detention without trial; freedom from cruel and unusual punishment; the right to legal representation when the individual's liberty is at stake; the right to be heard in one's own defence before one's liberty is curtailed; equality before the law; freedom of speech and literary expression; freedom of the press; freedom of assembly; and freedom of movement'.[56]

Now these are profoundly important liberties which have been struggled for and won, often at great cost, in those societies that we loosely characterize as democratic. South Africa, sadly, is not such a society, and while it may afford consolation or even encouragement to learn that this cornucopia of fundamental freedoms forms the basis of the legal order, the devastation that has been wrought upon it by successive lawmakers renders any such feelings distinctly ephemeral. Whether they may once have exerted a deeper influence on South African law I leave for legal historians to say, but as an account of the contemporary legal order it is essentially deficient. Moreover, if these principles are immanent in the law, on what basis is South Africa described as an unjust legal order? Yet I am not even certain that when judges, as they occasionally do, lean in favour of liberty, they are, in point of fact, rousing these Roman-Dutch principles from their slumber and not simply calling in aid their own sense of justice (whatever formula they may actually employ). But if the existence of such principles provides the authority they seek for such judgments, one cannot lightly dismiss their usefulness. The significance of this point will, I hope, emerge in a moment.

The limitations of the Herculean mode are at once apparent in a legal system that is essentially unjust. The moral disapprobation that Hercules would evince in such circumstances would compel him to adopt a different course of action. Identifying a legal order as unjust is not an exercise that lends itself to scientific precision.[57] Yet jurists agree that the Nazi legal system was the epitome of injustice; few

[53] *Minister of Posts and Telegraphs v Rasool* 1934 AD 167.

[54] 1934 AD 167 at 187. See also at 185. [55] Dugard op cit 374.

[56] Dugard op cit 383. If Dugard is correct, of course, these 'principles' could arguably be discerned by Hercules J.

[57] A disproportionately low priority has been accorded to this question by jurists. Indeed, Dworkin's notion of a 'wicked legal system' (though his examples are Nazi Germany and South Africa) is assumed rather than explained. Reference could be made, of course, to the Hart–Fuller disputation concerning the validity of unjust law, but the essential issue there is the consequences of injustice not its essence. Equally the natural lawyer's argument as to whether an unjust law is 'law' addresses itself to the problems of obedience etc. Compare John Finnis op cit note 8. An attempt is made to identify the nature of injustice by Edmond N Cahn *The Sense of Injustice* (1949). For a socio-historical perspective, see Barrington Moore *Injustice: The Social Bases of Obedience and Revolt* (1978).

would describe the South African system as just.[58] By simple virtue of its institutionalized racism, the law is profoundly unjust. By its exclusion of most South Africans from participation in the political process, the law is not only unjust—it is oppressive. And by the deprivation of civil liberties and access to the courts in a plethora of security enactments, the law is repressive; it is not necessary for me to list the ever-lengthening catalogue of statutes that combine to form the unjust legal system that is almost universally condemned.

These embarrassing questions can be answered, it seems to me, only by reference to a model of the judicial function that (in so far as models can) accurately describes reality. Dworkin's model, for all its imperfections, provides, in my view, a better account than the positivist model of Dugard and other liberal critics. Dworkin, in a neglected passage, suggests how his thesis might be applied to an unjust legal order in which a judge finds the law morally offensive:

> '. . . I do not want to deny that realistic cases can be found that present true conflicts between legal and moral rights, if not in America, then those in despotic countries, Nazi Germany and at present South Africa, to which jurisprudence often turns.
>
> 'Legal rights, in my view, are institutional rights, and these are genuine rights that provide important and normally very powerful reasons for political decisions. Background moral rights enter . . . into the calculation of what legal rights people have when the standard materials provide uncertain guidance. . . . But there are of course cases in which the institutional right is clearly settled by established legal materials, like a statute, and clearly conflicts with background moral rights. In these cases the judge seeking to do what is morally right is faced with a familiar sort of conflict: the institutional right provides a genuine reason, the importance of which will vary with the general justice or wickedness of the system as a whole, for a decision one way, but certain considerations of morality present an important reason against it. If the judge decides that the reasons supplied by background moral rights are so strong that he has a moral duty to do what he can to support these rights, then it may be that he must lie, because he cannot be of any help unless he is understood as saying, in his official role, that the legal rights are different from what he believes they are. He could, of course, avoid lying by resigning, which will ordinarily be of very little help, or by staying in office and hoping, against odds, that his appeal based on moral grounds will have the same practical effect as a lie would.'[59]
>
> '[N]o principle can count as a justification of institutional history unless it provides a certain threshold adequacy of fit, though amongst those principles that meet this test of adequacy the morally soundest must be preferred. If that test is applied to a wicked legal system, it may be that no principle we would find acceptable on grounds of morality could pass the threshold test. In that case the general theory must endorse some unattractive principle as providing the best justification of institutional history, presenting the judge with a legal decision and also, perhaps, a moral problem.'[60]

Dworkin distinguishes three distinct normative issues that arise in this situation:[61]

(i) Does the principle count in deciding what the law is? (This is in part normative, because it relates to the soundness of the principle in political morality.)

[58] 'I believe that, although some countries may be more violent and others more repressive, South Africa is *the* most unjust society in the world . . .': Brian Barry 'Injustice as Reciprocity' in E Kamenka and A Ehr-Soon Tay (eds) *Justice* (1979) 50 at 75.

[59] Dworkin 326–7. [60] Dworkin 342. [61] Ibid.

(ii) Would that principle be the best on which to found a legal system?
(iii) Is the principle so unjust that it would be wrong for the judge to enforce any legal right it supplies and preferable that he should lie instead?

Herculean labours may therefore be exported to a 'wicked legal system', and though I do not regard the outcome as particularly satisfying, I think the process by which it is reached more accurately describes the judicial role.

The Judge and Repressive Law

I have suggested that in many cases dealing with race and security laws, adherence to an 'unattractive principle' is the 'best justification of institutional history'. In such cases, however, the judge who finds himself morally unable to subscribe to such a principle and wishes in his judgment to support the 'background moral rights' has a choice: he may lie or he may seek to base his judgment on moral grounds. The latter is unlikely to offer itself to a lawyer as either an attractive or effective way of resolving a dispute. The judicial lie, on the other hand, requires a legal justification: it must be founded upon the legal principle which the judge finds morally acceptable. And it is here that the moribund values that lurk within the common law might be summoned up to afford an apparently legalistic rationale for a moral decision.

But if the lying judge is an infelicitous notion, it is also not an especially effective one where, as has occurred in South Africa, substantial legislative inroads have been made into the jurisdiction of the courts in important matters of civil liberty. The removal of the authority of the judiciary to question the exercise of executive power, under a wide range of circumstances, has considerably attenuated the jurisdiction of the courts.[62] Suppose, for example, that a cricket umpire were informed that henceforward his authority to declare a batsman lbw would be discharged by the chief administrative official of the cricket club placed at a strategic position on the field. The umpire might legitimately wonder whether this encroachment upon his powers did not constitute so gross a violation of his responsibility that he should, at the very least, wish to protest. Suppose that such limitations persisted until he was told that he no longer had the power to decide whether a batsman was out. His job would in future largely be confined to calling wides, no-balls, boundaries and byes. This is, perhaps, to overstate the case, but every diminution in our umpire's authority is an affront to his office. A point is reached when he ceases to exercise the very function for which he has been appointed. And

[62] It is this feature, more than any other, that diminishes the relevance of many of the jurisprudential disquisitions concerning the judicial process. See below.

the same is true of the judges. The ever-increasing sphere of unchecked executive discretion in matters of fundamental liberty—such as detention,[63] deportation,[64] banning,[65] and censorship[66]—reduces the members of the judiciary to impotent spectators of administrative action. This is a grotesque distortion of their calling.

In the face of such constraints upon his jurisdiction, even lying becomes an option that is effectively denied to the judge who finds himself to be a vehicle of laws of which he morally disapproves. Similarly, his opportunities to call in aid (as Dugard would have him do) the libertarian principles of the Roman-Dutch law are accordingly diminished. Such a course of action is therefore of limited utility. Nor is there reason to believe that judicial laments to government, though these are occasionally voiced,[67] are likely to engineer any change in the law. What is left? The judge seeking to do justice in an unjust legal system is plainly at the mercy of the legislature; as Didcott J recently remarked:

> 'Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation.'[68]

Moreover, our judge who, following Dugard, finds in favour of liberty (however we wish analytically to describe the process) is, in practice, likely to have his efforts frustrated in one of two ways: either his judgment will be reversed on appeal[69] or Parliament will enact legislation to nullify its effect.[70] Add to this the limitations imposed on his powers in matters of civil liberty, and, even if the positivist model of the judge with strong discretion is accepted, the potential for judicial activism is woefully meagre.

Yet none of this should be especially startling. One of the hallmarks of repressive law[71] is its subordination to the requirements of government. In consequence, law, in a repressive legal system, 'remains largely undifferentiated from politics, administration, and

[63] The Internal Security Act 74 of 1982 ss 28 and 29.

[64] The Admission of Persons to the Republic Regulation Act 59 of 1972 s 45.

[65] The Internal Security Act 74 of 1982 ss 18–27.

[66] The Publications Act 42 of 1974 s 38.

[67] See, for instance, the direction by Goldstone J to the registrar of the Supreme Court to 'communicate the court's displeasure' to the Minister of Co-operation and Development on the failure of the West Rand Administration Board to implement an Appellate Division ruling that black spouses be permitted to live together (*Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A)). See *Rand Daily Mail* 22 July 1981.

[68] *In re Dube* 1979 (3) SA 820 (N) at 821. See too *S v Adams* 1979 (4) SA 793 (T) at 801, per King J.

[69] A recent striking example is *S v Meer* 1981 (1) SA 739 (N), reversed in *S v Meer* 1981 (4) SA 604 (A). See A S Mathews (1982) 99 *SALJ* 1. See too *Minister of the Interior v Lockhat and others* 1961 (2) SA 587 (A).

[70] The enactment of the Reservation of Separate Amenities Act 49 of 1953 (ss 2 and 3), for instance, in effect excluded the court's jurisdiction over the validity of separate racial facilities. This was a direct response to decisions of the Appellate Division in the early 1950s that sought to uphold the 'separate but equal doctrine'.

[71] Here I am adopting the models of Philippe Nonet and Philip Selznick *Law and Society in Transition: Toward Responsive Law* (1978).

the moral order'.[72] The courts inevitably become the instruments of governmental power. The South African legal order exhibits a number of elements of this paradigm; yet it is undeniably the case that in several respects the courts maintain a parallel system of law which manifests certain characteristics of autonomous law[73] which we should not expect to find in a repressive order. In this system judges assert their independence, engage freely in criticism of the law, and assiduously endeavour to uphold the principles of fairness and justice. But this system of law is, in general (though the application of the general principles of criminal law is a conspicuous exception), private law. This branch of the law preserves, in large part, the rights of the privileged class, which may be loosely translated as the whites. Judgments of unimpeachable equity are consistently handed down by the South African judiciary on a wide variety of civil matters. The full majesty of the law is brought to bear on disputes between parties to a contract, between shareholder and company director, between husband and wife. Here the state is essentially a passive party and, in consequence, the independence of the judiciary is virtually untrammelled.

This is not to endorse the crude, reductionist Marxist view that law is nothing more than ideology, that it merely legitimizes class power.[74] Yet there is unquestionably an important and possibly even essential need for governments to justify what Weber called the 'monopoly of legitimate violence'.[75] And the law is inevitably employed in pursuit of legitimacy. A government that can point to an apparently independent judiciary which, though it may occasionally utter its disquiet in respect of certain enactments, acquiesces in the promulgation of blatantly unjust laws and Draconian assaults upon some of the most sacred principles of justice, is readily able to legitimize itself. A repressive legal system that can depend on almost unqualified acquiescence from its judges may preserve the appearance of its legality intact. It is therefore self-evident that a judge who is unable morally to reconcile himself to the injustice of the system willy-nilly lends legitimacy to it.

It would be folly to deny that, even within the narrow compass permitted to them, judges can and do dispense justice. Indeed, among the members of our own provincial division, there are several distinguished examples.[76] Consider the recent important decision by Leon J in *Magubane v Minister of Police*.[77] The learned judge held, in

[72] Nonet and Selznick op cit note 71 at 51.

[73] Nonet and Selznick op cit note 71 ch 3.

[74] For a persuasive (if polemical) refutation of this view, see E P Thompson *Whigs and Hunters* (1977). See too J Habermas *Legitimation Crisis* (1973) Part III.

[75] Max Rheinstein (ed) *Max Weber on Law in Economy and Society* (1954) 342.

[76] See, for example, *Magubane v Minister of Police* 1982 (3) SA 542 (N); *S v Gibson NO* 1979 (4) SA 115 (D) (judgment of Milne J); *S v Meer* 1981 (1) SA 739 (N) (judgment of Shearer and Didcott JJ); *In re Dube* 1979 (3) SA 820 (N) (judgment of Didcott J).

[77] 1982 (3) SA 542 (N).

essence, that the Police Act 1958[78] did not bar a detainee who had allegedly been assaulted by members of the Security Branch from bringing an action against the Minister for damages in respect of her injuries. This Act provides that any civil action against the state must commence within six months after the cause of action has arisen. But the plaintiff was in detention throughout and beyond the six-month period within which she was supposed to commence proceedings. She was hardly in a position to sue. But another statute, the Prescription Act of 1969,[79] allows a plaintiff who is 'prevented by superior force'[80] from serving his summons, a further year after the superior force has ended. The Minister argued that the Prescription Act did not apply to an action under the Police Act. In other words, she was too late to sue the Minister because she was being detained by the Minister and was therefore prevented from suing! Leon J declared:

> 'The question . . . is whether s 13 of the Prescription Act operates with reference to an action covered by s 32(1) of the Police Act. In contending that it does not, Mr Hiemstra, for the Minister, conceded that that result might offend against one's sense of justice. It is an affront to my sense of justice.'[81]

He held that the Prescription Act did apply and hence the plaintiff's action was commenced in time.

But though such decisions are of paramount importance to the parties to the dispute or even many others indirectly affected by the decision, they do not redeem the system's essential injustice—even if (which is unlikely) they survive reversal on appeal[82] or by legislation. Nor, a fortiori, do the occasional judicial expostulations in the name of justice serve any more point than fragile reminders that all is not right. But these are faint voices in the wilderness. Even in an essentially just legal system (as the former Master of the Rolls discovered) they can be singularly futile. And in an unjust legal system, the Dugard analysis is intrinsically misplaced: it is located in a paradigm of the legal order that is a distorted shadow of reality. It employs tools that (despite the duality of the legal system) are, in many cases, inappropriate to repressive law. An exclusively white judiciary applies the essentially unjust laws of an exclusively white legislature to an unconsenting majority. Talk of the independence of the judiciary rings decidedly hollow in the context of the political-legal configuration that is contemporary South Africa. Of course, judicial independence, the Rule of Law, freedom and equality of the individual, are ideals of supreme importance; but the law, by

[78] Act 7 of 1958. [79] Act 68 of 1969 s 13.

[80] Section 13(1)*(a)*.

[81] 1982 (3) SA 542 (N) at 549. [See now *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A)—Editor.]

[82] This should not be thought to imply that judges of the Appellate Division do not periodically seek to 'redeem the system's essential injustice'. See, for example, *S v Moroney* 1978 (4) SA 389 (A); *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A).

violating them, fundamentally alters the very nature of the legal system. Of course, judges adopt the positivist view that Parliament is sovereign and that the law is what Parliament declares it to be;[83] this is a pervasive notion in repressive law (though it is not exclusive to it). Of course, the law may be employed to control arbitrary power, but the courts are paralysed by legislation in almost every area pertaining to civil liberty. It is in this context that the judge's role (as well as the function of other elements in the legal system) needs to be analysed and evaluated. Dugard himself acknowledges that

> '[f]or blacks [the South African legal system] . . . is . . . a repressive system imposed without consultation and enforced by an array of instruments of coercion—the army, the police, and the legal-administrative machine. It is therefore small wonder that blacks do not share the admiration of the white South African for the majesty of South African law, the mysteries of the Roman-Dutch tradition, and the impartiality of the South African judiciary and administration.'[84]

But the model yielded by this perspective is not one that permits of a judicial function that approximates any longer to its British progenitor. This is not the place to indulge in a wholesale analytical reconstruction of the South African legal order (though there is an urgent need for lawyers, sociologists and political scientists to do so), but its consequences for the question I pose tonight are difficult to avoid. If the judge is to square his conscience with his calling, there would appear to be no choice open to him but to resign. How have I arrived at this conclusion? First, by rejecting the positivist assumption that judges have discretion in the strong sense. Secondly, by recognizing that South Africa conforms in many ways to the model of a repressive legal system. Thirdly, by accepting that a judge in such a system who is unable to reconcile his moral standpoint with the law has three choices: to protest, to lie or to resign. And fourthly (by expressing doubts on whether protests would bear fruit, and by pointing to the limitations of the judicial lie—caused principally by the severe constraints of the courts' jurisdiction) concluding that there is no compelling alternative to resignation.

No South African judge has ever resigned on grounds of conscience. Sir Robert Tredgold, Chief Justice of the Federation of Rhodesia and Nyasaland, resigned after the publication in 1960 of the Law and Order Maintenance Bill. He declared that 'it would compel

[83] Professor Dugard has, along similar lines to those adopted by Professor Fuller, sought to show that it is principally through their 'positivist' approach that South African judges have failed to protect human rights. See John Dugard *Human Rights and the South African Legal Order* Part IV and 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *SALJ* 181. This view (though, ironically, it is itself based on a positivist account of the judicial function) has sparked off a lively debate. See J Gauntlett 'Aspects of the Value Problems in Judicial Positivism' (1972) 2 *Responsa Meridiana* 204; Christopher Forsyth and Johann Schiller 'The Judicial Process, Positivism and Civil Liberty II' (1981) 98 *SALJ* 218; John Dugard 'Some Realism about the Judicial Process and Positivism—A Reply' (1981) 98 *SALJ* 372. A discussion of this issue would be out of place here; my point is that in a repressive order it would be surprising if anything other than a 'positivist' view were exhibited. See Nonet and Selznick op cit note 71 at 34.

[84] *Human Rights and the South African Legal Order* 401–2.

the courts to become party to widespread injustice',[85] confessing, in his memoirs, that he 'had watched the build-up [of "harsh laws"] with something approaching agony'.[86] The Rhodesian statute (which, in its conferral of executive powers, does not go as far as the Internal Security Act of 1982) was, in Sir Robert's view, 'the last straw'.[87]

The suggestion that judges who experience moral uneasiness about the law should resign might be met by at least two arguments. The first runs as follows: By resigning, a judge relinquishes his opportunity to curb or mitigate the effects of the iniquities of the law; moreover, he is likely to be replaced by a judge who, in all probability, may not share his concern to exercise such a function. Resignation would, in short, be counter-productive. This is a difficult argument to refute, particularly in the absence of any precedent in South Africa. The resignation of judges in Southern Rhodesia had, as far as one can tell, almost no effect at all on the events in that country; why, therefore, should the impact of resignations be any different in South Africa? To this question I think there are several possible answers. I am certainly not qualified to proffer a comparative analysis of the two societies, but I am inclined to think that the role and standing of the courts differ materially in each country. The position of South Africa in the world in the 1980s also suggests that the effect of a conscientious judicial resignation would be substantially different. But what might that effect be? I do not think we should underestimate the impact of a principled resignation by an official whose very occupation proclaims the pursuit of justice and who is, at least in the view of those who appointed him, respected, wise, dispassionate and, of course, judicious. Judges are not given to rashness; a declaration by a judge that the extent of the law's deviation from justice is too great for him to countenance might echo, albeit faintly, through the halls of government. Nor should its possible effect on other judges be discounted.

The second argument, which is connected to the first, suggests that there is still considerable room for a judge to seek to do justice judicially or even extra-judicially. There is, for example, a discretion in the courts to refuse to admit as evidence confessions obtained while a detainee was under duress.[88] It is argued that if judges adopted a

[85] Quoted by Sydney Kentridge in 'The Pathology of a Legal System: Criminal Justice in South Africa' (1980) 128 *University of Pennsylvania LR* 603 at 619.

[86] Robert Tredgold *The Rhodesia That Was My Life* (1968) 232.

[87] Ibid. In 1968 Fieldsend J (see *The Star* 4 March 1968) and Dendy Young J resigned, the latter declaring that 'on a matter of judicial conscience' he could no longer continue as a Rhodesian judge because of the ousting of the Privy Council from the judicial hierarchy in terms of the constitution (*The Star* 12 August 1968).

[88] The Judges' Rules are, at least nominally, applicable in South African courts, though it has been argued that '[t]he judges themselves have emasculated the Judges' Rules' (V G Hiemstra (1963) 80 *SALJ* 187 at 206). According to L H Hoffmann and D T Zeffertt, 'there is little evidence that the Rules today have any practical effect' (*The South African Law of Evidence* 3 ed (1981) 187). See *S v Christie* 1982 (1) SA 464 (A), noted by D M Davis in (1982) 99 *SALJ* 516.

stronger line on this question, it might operate as a disincentive to those who allegedly employ improper means to obtain such confessions. Similarly, judges have the opportunity to interpret oppressive legislation in favour of the victim; this was emphatically illustrated in a recent decision[89] under s 10 of the Blacks (Urban Areas) Consolidation Act.[90] This infamous 'influx control' provision prohibits blacks from remaining in an urban area for more than 72 hours without permission from an urban local authority. O'Donovan J held that blacks who commute daily between their homelands and their work in an urban area are entitled to live permanently in the urban area, provided they have worked continuously for one employer for ten years, or for several employers for fifteen years.[91] In the past such workers were compelled to become migrants, for their contracts of employment had to be renewed annually. This meant, in effect, that they were unable to satisfy the continuity of employment requirement and, hence, to live permanently in the urban area. By virtue of a small, relatively technical, point of statutory interpretation, the lives of thousands will be rendered less insecure, more normal. This is undoubtedly an important decision. But it must be seen in context. Though the harsh effects of 'influx control' have been tempered, the system remains largely unchanged. There is, moreover, a chance that the legislation may be amended or that this decision of the Witwatersrand Local Division may be taken on appeal.[92] The courts, in other words, whether it be in the sphere of security or race legislation, become vehicles for the enforcement of unjust laws. More than that, by their exercise of the judicial method they lend respectability and legitimacy to injustice.

A resignation would be a clarion call: a statement of judicial despair and outrage. It would be an assertion of the judge's absolute fidelity to justice, a protest against the abuse of law. In a repressive legal order it would constitute an act of faith in the face of unconscionable legislation. But is this simply naïve idealism? I think not. The Cape Town-based Civil Rights League suggests an even more portentous dimension: resignations, it says, may, 'looked at retrospectively, . . . be seen as the sparks which kept alight a fundamental belief in the best traditions of our Western heritage'.[93] I do not think that this should be lightly dismissed, but more than mere historical redemption, they

[89] *Rikhoto v East Rand Administration Board and another* 1982 (1) SA 257 (W).

[90] Act 25 of 1945. See too *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A).

[91] These are the conditions prescribed by s 10(1)*(b)*.

[92] The legislation has not been amended. The Appellate Division in *Oos-Randse Administrasieraad en 'n ander v Rikhoto* 1983 (3) SA 584 (A) dismissed an appeal by the Board. Problems remain in respect of the implementation of the decision.

[93] *The Responsibility of Judges in Applying Unjust Laws in South Africa* (1981). See John Dugard 'Judges and Unjust Laws' (1981) 22(2) *Codicillus* 55; Gerald Gordon 'Judges and Justice' 1981 *South African Outlook* 11.

offer hope that the law might yet serve the ends of justice—notwithstanding its present misuse.

Conclusion

It is not my purpose to disparage the judges individually or collectively. Which of us could say with certainty what we should do in the circumstances? It is all too easy, from an academic armchair, to pontificate on how others should behave. The issue is complex and delicate and personal. What has led me to my conclusion is reflection upon the essential nature of the South African legal system. I hope that my long absence from this country has sharpened rather than dimmed my vision. But even if I am wrong, I believe that these questions need to be asked and discussed and answered. Our legal education needs to reflect the realities of the legal system, and I am encouraged by the fact that this view is shared by a growing number of law teachers, including members of our own Faculty of Law. This means that our analysis of the law and the legal system ought to be informed by social-science perspectives and even methodologies. This academic symbiosis has long been acknowledged as axiomatic by law schools abroad, and this is dramatically evident from the prodigious output of literature, especially in the United States and Britain, on socio-legal issues. The genesis of a similar development is detectable in this country.

There is nothing profound or even novel in the suggestion that lawyers, by virtue of their profession, have a responsibility to foster a belief and confidence in the potential of law as a means of securing social justice. Nor is it, therefore, illogical that for teachers of future generations of lawyers this responsibility should be especially important. Balanced, scholarly and honest criticism of the law and of those who make or administer it is a vital ingredient of serious legal education.

The judge has onerous responsibilities too:

> 'It is an awesome thing to go forward before the judge and await the utterances of his decision. . . . He symbolizes the merger of conceptual justice with organized coercion, the rational humane with the mass brute. In him have been remitted the ideals of his culture and the power to compel submission. When a citizen stands in court he feels the immediate impact of that power; it is all assembled and concentrated there on him.'[**]

This, in an essentially just legal system, is a terrible power, to be exercised with the greatest circumspection and trepidation. In a system that is fundamentally unjust, its application is a direct challenge to the morality of the judge and to the very purpose of the judicial process.

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** Edmond N Cahn *The Sense of Injustice* (1949) 133.

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