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dialogues*



\* monograph 17



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OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA

**SPEAKING TRUTH TO POWER:  
POLITICS AND JURISPRUDENCE IN A YOUNG DEMOCRACY**

**\*monograph 17**

ISANDLA INSTITUTE / OPEN SOCIETY FOUNDATION

**About Development Dialogues**

*Development Dialogues* is a joint initiative of Isandla Institute and the Open Society Foundation for South Africa. The aim of the public dialogue series is to create a space for critical reflection and dialogue among key development stakeholders in South Africa. In doing so, the organisers seek to make a (rather modest) contribution to enhancing the quality of debate in the development sector. Through *Development Dialogues*, Isandla Institute and the Open Society Foundation intend to bring about creative and constructive multi-stakeholder meeting opportunities that push stakeholders to think beyond the confines of their immediate interests and theoretical paradigms.

This monograph captures the speakers' inputs and discussions at the *Development Dialogue* on 'Speaking truth to power: Politics and jurisprudence in a young democracy', which took place on 6 November 2008 at the Centre for the Book in Cape Town.

Published in 2009



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**T**he judiciary in a country such as ours is always going to be in a political difficulty, because in a constitutional democracy such as we began in 1994, the judiciary has the power to set aside legislation and the decisions of the executive. And when you have a judiciary like ours which is not elected, but effectively appointed for life, you immediately engage in what is called the counter-majoritarian difficulty, which is: why should judges – unelected, not essentially accountable to anything other than the Constitution, rarely if ever susceptible to disciplinary action – have the power to interfere with the policies of a democratically elected legislature, and therefore indirectly of the executive?

It is not a problem that faces South Africa alone. Every constitutional democracy has this problem. For instance, people have spoken about the recent United States of America's presidential election results as being their Mandela moment. And obviously for those who really were desperate to get rid of eight years of Republican rule and more, the election of Barack Obama was a really progressive moment.

In my view the most single important implication of the election of Barack Obama to the United States presidency is that the United States Supreme Court will not lurch violently to the right. The United States Supreme Court has nine judges: four essentially liberal judges, four desperately conservative judges and Judge Kennedy, a quasi conservative judge, who drifts in and out of extreme

forms of conservatism, who is effectively the swing vote. The power of the United States President to appoint a judge is regarded as one of the most important appointments that he or she can make. Everyone knows that depending on the composition of the Supreme Court social policy will either go one way or the other. One of these judges is 88 years old. If he were to be replaced by a conservative jurist, it is likely that the famous decision of *Roe vs Wade*, which gave women the right to abortion, would be utterly discarded. That is the Republican agenda, which would have been the end of that particular aspect of gender equality in American constitutional law. It is probably true that the last remnants of affirmative action would also be discarded, and many other similar decisions. And there would be no certainty that the Supreme Court would assert *habeas corpus*, a legal action through which one can seek relief from unlawful detention, in relation to Guantanamo Bay.

Why do we have this little detour into the United States of America? To show you that inherently constitutional democracy is a politicised process. It depends on the composition of the courts and the judges in turn have a significant role to play in the political process of the country. We are not unique in that regard. Nor might I say is criticism of the judiciary unique. Judges who are in a constitutional democracy have to understand that rigorous, public criticism of the judiciary is part of the democratic process – and perhaps the most significant way in which judges are held accountable to the constitution they uphold.

My first point therefore is that inherent to our model of constitutional democracy is an inevitability that judges are going to be at the receiving end of

**Constitutional democracy  
is a politicised process.**





## Inherent to our model of constitutional democracy is an inevitability that judges are going to be at the receiving end of vigorous political criticism.

vigorous political criticism. The beauty of freedom of speech is that you cannot select who you want to speak. Calling judges counter-revolutionaries may be silly or ill-advised, but it is a natural process.

Secondly, judges are never going to be referees. The only people who think they are referees are conservative judges, who want to fool you into believing that ideological frameworks, views of the world and value systems are completely and utterly irrelevant to the process of judging. That is why the Chief Justice of the United States of America likened himself to a baseball umpire. A baseball umpire has to simply apply the rules of baseball. In contrast, judges make the rules. We shape and change the rules. We actually give content to that very rudimentary text which we call a constitution. Judges are therefore players. And we should get out of the way that there is some kind of process of utter and complete neutrality. To be sure, in the process of judging, judges are constrained by precedent and by the language of the text. They are constrained by nature of the argument. They are not free to do what they want to. They have to adjudicate. But within that process of adjudication, inevitably value judgements will be made and effectively reflected in judgments. Ask any advocate. When they go to court for the first trial and they draw a judge, there is not a practitioner in the

world who is not interested in who is our bench today. A very well known advocate once said to his client in front of me: 'We have drawn this judge so we can treat it as a home match as opposed to an away match.' In other words, the judicial philosophy of the judge does matter and tensions are always going to be imminent within the system that we have.

Once you accept that the separation of powers doctrine is going to require certain encroachment into fields which hitherto were the sole provenance of a legislature or executive, then obviously the judiciary becomes a focal point of criticism.

Our concern as the public is certainly what parameters we adopt for criticism of the bench. While it would not be proper for me as a judge to opine on the law related to the Zuma case, I do believe that the surrounding circumstances of what occurred in that case is cause for concern. Once you start talking about not being able to get a fair trial in the country, what does it say about the judiciary? When you start talking about judges being counter-revolutionaries, what does that mean? Anyone is entitled to criticise the output of judges. So if supporters of Mr Zuma are angry about a particular court ruling or critical of decisions taken by the National Prosecuting Agency, that is fair game. Robust, fair debate is part of democracy. But when you call into question the judiciary competencies to fulfil its mandate, then you erode the process which underpins the constitutional democracy in the first place. As a judge I then have to say that I am somewhat concerned about that.

As far as the composition of the bench is concerned, it is correct to remind ourselves of the





legacy of the judiciary. If constitutional democracy is a difficult problem in any society for the reasons I have briefly outlined, how much more so in a society where law was used ruthlessly to reproduce a racist and sexist society for 300 years, in which the judges, with some glorious exceptions but few of them, by and large enforced those judgements and therefore assisted in the reproduction of the system that we called apartheid.

There was no question about it; the judiciary had to be transformed. I for one absolutely understood and still understand that a South African judiciary had to reflect the diversity of our society. Not in terms of some kind of arithmetical computation, but in broad terms the judiciary has to reflect the demography of the country. This is important because of legitimacy and diversity. To suggest, quite absurdly, that we should not have taken any account of gender or race in the appointment of judges, given the fact of what has happened under apartheid, would have been to undermine the legitimacy of the institution. And diversity is important because of the value laden nature of the judiciary. People with different backgrounds bring different things to bear on the problem. Drawing people from only one background means you are losing the profound richness of diversity, which is central to a transformed jurisprudence. Of course, there has to be a basic requirement which is probably quite a high requirement of legal knowledge and legal skill and so forth.

I want to suggest to you that there is another requirement when we talk about the transformation of the bench, which is the ideological transformation of the bench. In my view, when you have a

judge appointment one has to ask further questions, such as what is going to be in the best interests of historically disadvantaged people in this country? What judge as it were through his or her work closes the gap between the glorious aspirations of our constitutional text and the realities which presently disadvantaged South Africans suffer on a daily basis? In whose interest is the appointment made? Is it made to fulfil the constitutional enterprise, which is to close that gap? What if you are faced with a choice between Justice Thatcher, who may be a woman but never promotes any gender issue at all, and a man who writes judgements which promote gender equality? More than 50% of judges are black and although not sufficient, this is pretty good progress in 15 years. But only 15% or 16% of the judiciary are women and there is not one head of court who is a woman. Of all the heads of court in South Africa, are black men save for one, a white man. This clearly is cause for concern.

## The judicial philosophy of the judge does matter.

Given the visible trend to ensure that the judiciary is more reflective of our society, what does it mean when one continues to call for the transformation of the bench? Is it a call for a stronger commitment to the transformative Constitution, or a call for having more reliable judges, who will not talk constitutional truth to power but in a sense will be more executive minded? When we talk about transformation of the bench, let us get clear what we really mean. ■





Recently heard Judge Scalia speak at the Harvard Politics Union in the United States. He is conservative, controversial and highly respected for his rigorous judgments. At his presentation he touched on a number of controversial issues that were current in the USA. The academics and students boldly stood up to him, citing some of his judgments on abortion and gay issues. One gay student challenged him on some or other judgment that he perceived to be anti-gay, and when Scalia clearly argued his judgment, the student, determined not to be defeated, charmingly said: "Well Judge Scalia, I am gay and would you be my friend" completely disarming the judge.

This was in stark contrast to a recent speech delivered by Judge Arthur Chaskalson at Stellenbosch University at their "Ethics in Leadership" conference. At the time when the judiciary was boiling, Chaskalson took a safe subject looking at the challenges that faced the judiciary under apartheid.

So many judges who saw their fortunes tied up with the anti-apartheid struggle find it difficult today to criticize the government under the new dispensation, because to do so would be an admission of failure.

Here judges keep their heads under the parapet, except when retired, for another reason – in order not to jeopardize their chances at promotion. Some have become so neutral, that they walk around like automatons, so politically correct as to lack blood.

When Supreme Court of Appeal Judge Carole Lewis recently exposed the state of the judiciary condemning how flawed appointments based on

## Judges keep their heads under the parapet in order not to jeopardize their chances at promotion.

race rather than competence, skills, experience, and merit, had weakened the judiciary, resulting in judgments that did not stand up to scrutiny, she was lambasted by the Black Lawyers Association (BLA). The quality of judgments according to her has deteriorated so extensively that many acquittals and criminal convictions were due to shoddy work.

Weak judges are open to political abuse and patronage making it easier for government to exert control over them. We have seen this with the Desai and Erasmus Commissions.

In 2006 Judge Azhar Cachalia made similar comments when interviewed for a job on the Supreme Court of Appeal, stating: "...that provincial judges were making grave fundamental mistakes in their decisions...", "...that errors were so serious that they could result in the acquittal of people who had committed violent crimes...", "...that the Supreme Court of Appeal had seen a number of shockingly bad high court judgments with intolerable mistakes...".

True to form the BLA at their AGM lashed out at Judge Lewis threatening to send a petition to the Chief Justice to raise their concern about the "serious negative insinuations" that posed a "direct challenge to black judges."

South Africa has become a haven for poor affirmative action appointments from the most senior positions to the lowest. The problem now is

## Weak judges are open to political abuse and patronage.

that few have any modesty about their lack of qualifications, skills, or experience and boldly put themselves forward for jobs they know they are not qualified for. The logic is, if so and so can be President, or Vice Chancellor, or Director-General, then I can be Kofi Annan!

So when Judge Kriegler was the only judge who dared to speak out against the Judicial Services Commission's (JSC) decision not to impeach Judge President Hlophe in spite of a long list of misdemeanours that should have disqualified him a long time ago from high office, he too was condemned by Senior Counsel Advocates Dumisa Ntsebeza and Ishmael Semanya who patronizingly accused Kriegler of failing to accept a ruling he does not like. Ntsebeza called Kriegler's comments unsolicited, gratuitous, intemperate, self-indulgent and unprofessional, revealing how deep the racial animosity was on the bench.

The JSC failed to divulge why a mere slap on the wrist was good enough in a case that was so public and so blatantly questionable and that was a serious indictment of the JSC.

Many have commended Kriegler for his boldness, but when race is perceived to be the object of one's courage, the message loses its punch. Kriegler's mission was to salvage the bench from fellow colleagues, intent on bringing it into disrepute for their own vested interests. It had nothing to do with the fact that he is white. It had

everything to do with the fact that he is a judge, inspired by the sacred 'oath' judges have a duty to uphold. And as for the Black Lawyer's Association, calling on the JSC to sanction Kriegler for his "improper" and "uncollegial" show of disrespect to the JSC, was to nail its colours of racial solidarity so solidly to the mast as to have lost all credibility.

The sooner the BLA gets rid of its collective 'woundedness', the better for the country. To question the integrity of Kriegler for raising legitimate concerns over the JSC's lily-livered ruling exposes them for the professional laxity as is their wont.

Many previously respected black people in high places have tainted our watchdog institutions to such an extent, that the institutions themselves have become suspect and have lost their constitutional virginity. The heads of these agencies have gotten away with murder simply because they are black. A combination of patronage, race, and vested interests has become the deadly cocktail by which this country is governed.

Judges are obliged to uphold our Constitutional democracy, based on equality for all, the rule of law, the independence of the judiciary and the separation of powers and as such, Kriegler has done his duty to condemn Hlophe's unbecoming behaviour against a profession that should be beyond reproach.

Not only was Hlophe on the payroll of a very controversial company, Oasis; he lied; and he crossed the conflict of interest barrier way beyond what is acceptable by failing to recuse himself in the Judge Desai-Oasis defamation suit. Hlophe has been let off the hook because he is black. It is as





simple as that. We are indeed on the “Hlippery Hlophe” when racial solidarity trumps issues of justice and integrity in an institution that should be the embodiment of these values.

In conclusion, South Africa has gone through trying times under President Mbeki’s erratic rule. And during this time of political unease, it was disturbing to see how many comrades, who fought for democracy and freedom, shut up in the face of those who rewarded the acquiescent with position and patronage. Those of us who refused to be silent quietly became the enemy. The free flow of ideas was bedeviled by a range of pressures that have come to haunt the fragile democracy we have today.

The tyranny of political correctness, the tyranny of the majority, the fear of being called racist or disloyal, embedded journalism, and vested interests fearful of blocking access to patronage became standard discursive devices used to stifle independent critical thought. They contributed to the deluge of self-censorship one detected in the media, in public life, and around dinner tables.

Patronage, access to jobs, or a promotion and access to power so easily determined what one said and did not say. The silence of ministers and civil leaders around the HIV/AIDS debacle is a case in point. No one in the cabinet dared question the president on his idiotic stance on the virus and many were prepared to suspend their intellects in defense of the president. The more people submitted

**When race is perceived to be the object of one’s courage, the message loses its punch.**

to this tyranny the more it became a way of life. These “mechanisms” impeded freedom of expression and association and to some extent had the same effect repressive legal obstacles had on activists denied free speech under the old regime. And slowly but surely George Orwell’s warning became a reality: “if freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter.”

The fear of being called racist, right-wing, sell-out, disloyal, traitor and unpatriotic was so powerful that many were prepared to sacrifice the truth. Even academics feared to ply their trade in public, lest they be construed as reactionary. “One gets branded so easily” was the stock answer from former colleagues who were most vocal during the struggle. It was so bad that one of the authors of the Medical Research Council (MRC) AIDS Report confided at a private briefing that the AIDS situation was so terrifying that he would not contest the statistical findings of government commissioned research, even if flawed, since the AIDS crisis demanded such urgent attention of government that quibbling would just further delay treatment to patients dying. ■



Someone once said that democracy is the worst form of government but it is still better than all other forms. The Polokwane moment was a watershed moment in South Africa's 15 years of democracy because of the factors that led to that and the forces it has unleashed, which amplifies some of the weaknesses in our society. It is therefore a real test of our democracy.

We have become a very angry and emotional society, where it is very difficult not to take sides. The danger of that is that we tend to simplify very complex issues that require a nuanced approach and sensitivity. In reflecting on these issues, I am reminded of the phrase 'forward to the past' or 'back to the future', in all the paradox that that phrase captures.

**The danger is that we tend to simplify very complex issues that require a nuanced approach and sensitivity.**

Let me begin by invoking what Franz Fanon, a scholar, activist and psychologist from Martinique, said in his book 'The Wretched of the Earth'. He writes a passage which is very profound, where he says that each generation must discover its mission – fulfil it or betray it. Coming to the topic at hand, my perspective is on the politics of what is happening and how it impacts on the jurisprudence.

When we talk of democratic values, groups uphold these for two reasons, either for self-

advancement or out of principle, whether it is in their favour or not.

The ANC's own internal divisions and the struggle for the soul of the ANC, as some have said, has amplified the weaknesses in our system. Because this is a dominant and governing party, it needs serious and immediate attention. The other challenge that we have seen is the over-penetration of the party into the state. In fact, very often the lines between the party, the government and the state tend to be blurred. Therefore I agree with Judge Davis that the checks and balances should not be seen as absolute but at the same time their violation can pose a serious danger in any democracy. What is the nature of this problem and why is it occurring? I will try to simplify it by looking at the ANC itself.

During the 1970s and the 1980s, the ANC and many other liberation forces were engaged in a liberation struggle which was very much of a confrontational nature: 'us' against 'them'. Therefore, the ANC's philosophy of what was to happen in a transformed society was shaped by that particular period. Very often the language of the revolution was invoked. Whether you read Mayibuye or The African Communist, the preparation for a take over was what dominated the thinking. The negotiated settlement of the early 1990s was essentially a compromise within the framework of a liberal democracy in a multiparty setting, in a constitutional democracy.

To some degree what we are witnessing now is the tension between this desire to take over and have political hegemony versus the restraints and checks and balances in a multi-party democratic system. The whole concept of deploying a party



to take over this department or that department was informed by this striving for hegemony. More recently, leading up to Polokwane, the revolutionary rhetoric has been revived, versus those who wanted to modernise the party into the new context.

Of course, the reality is a lot more complex than that. But I am trying to simplify it. When I was doing some work on Namibia's exile and return experience, I came to realise that the exile environment imposes certain conditions and political parties or liberation movements have to develop a certain political culture in response to those conditions. One of these is the notion of solidarity with a comrade, no matter what. It is for that reason that when Zuma was fired and prosecuted, you had this response that he is a fellow comrade and ought not to be treated this way. So a sense of betrayal comes.

Similarly, following the recall of Mbeki, a sense of counter-betrayal emerges. When you see people marching for Tony Yengeni and for Zuma in solidarity, it is in the context of that political culture.

But understanding the political culture does not mean that you have to condone and accept it. The point I want to make is that those who call for greater separation between the party and the state, those who criticise the Speaker of Parliament for marching with Tony Yengeni to prison, that these things happen precisely because that notion of separation of party and state has not actually occurred. Hence the notion of deployment. I assume that when Judge Davis was talking about safe appointments, it is in that sense of deployment.

The notion of deployment is rather complicated and obscured in many ways because usually there

## We have seen the over-penetration of the party into the state.

are no clear criteria for a particular kind of deployment or who qualifies. Therefore it is susceptible to patronage networks. Our electoral system gives more power to party leaders, who in turn can determine who goes into Parliament, who will be in the deployment committee, and so forth. In the end, both state power and party power may be concentrated with the party leader. Recently we have seen how the centralisation of power can be susceptible or vulnerable to the politics of personalities. This is where the notion of a big man comes in, where one's close proximity to the chief tremendously improves one's access to power and resources, or one's appointment to this commission or the other.

We need to revisit this notion of deployment, because the current crisis has shown us that the lines between the party and public office tend to be blurred. And at the height of this internal fighting within the ANC, those holding senior government positions have started turning on each other instead of doing their duty.

We should never use this argument not to insist on the transformation of the judiciary, given our history. This does not mean that one supports judicial activism, where a judge has gone beyond interpreting the law and has embarked on an advocacy mission. This holds the danger of the judiciary being dragged into very sensitive contested political terrain.

The sovereignty of citizens versus the law making process does have an impact on how we perceive the judiciary, as does our political history and the legacy of our laws. While I was at the Heritage Council, there was uproar over Tony Yengeni's ritual slaughter of what the newspapers variously called a bull, an ox or a cow. This revealed that we still had a law from 1962 which primarily targeted African customs and rituals for the welfare of animal protection, yet saying very little about a lobster being boiled live in an upmarket restaurant. You understand the context of how this law evolved.

**We are witnessing the tension between the desire to have political hegemony versus the checks and balances in a multi-party democratic system.**

Secondly, numerous laws have been passed without the majority of people being involved in the process. They would not necessarily have opposed these laws, but could have assisted in explaining how to apply it in their particular cultural context. Once you begin to ignore that base, it means you will not have the defenders of some of these laws. In the long run the whole notion of constitutionalism being embedded across cultures, across groups is weakened. Therefore, the transformation of the judiciary as well as revisiting the very process of law making becomes very important, because sometimes there is a tension between cultural rights

## The centralisation of power can be susceptible to the politics of personalities.

and human rights as constructed within the constitution.

The last point I want to make, is that some people are saying that Parliament of late has become more active, more assertive. In the past it used to be the Union Building, the Executive, which would propose the laws that Parliament endorsed. But that in itself still needs to be tested because it may be that now the power has shifted from the Union Building to Luthuli House instead of Parliament. On issues such as the Scorpions Bill and many others, there is clearly a direct relationship with an ANC resolution. So we still have to see whether Parliament is indeed more assertive.

Perhaps in the midst of all this, we need some leadership qualities, an Obama to take us forward. At the moment, the manner of engaging the judiciary suggests that it may be degraded if it receives the full frontal assault. On the day when the judgement favours you, you say 'Bravo, this is wonderful.' You cannot have a perspective that says 'I will embrace you if you agree with me, but I will kick you in the jaws if you are against me.' ■





### AFTER THE INPUTS THE FLOOR WAS OPEN FOR QUESTIONS AND COMMENTS. ISSUES THAT WERE RAISED INCLUDED:

- What must the ANC do to transform from a liberation movement into a modern political party?
- What's the role of the Judicial Services Commission?
- Why is the American situation relevant and what is the implication of judicial activism?
- There is very little room to manoeuvre within the ruling elite, which means that NGOs have a very important role to play in 'speaking truth to power'.

### IN RESPONSE THE SPEAKERS MADE SOME CONCLUDING COMMENTS:

#### Dennis Davis

I am never quite sure what we mean by judicial activism. Many of you like the idea that judges enforce socio-economic rights and hold the government accountable. Some would refer to that as activism. I think the notion of judicial activism is something that is a very problematic concept and we must be careful.

Many cases, particularly constitutional cases, are brought by poor people. But their access is constrained because of backlogs. This is not the fault of judges. I accept that in certain instances the judiciary has to look at whether our rules, and the way in which we go about our business, do not create backlogs. But very often the problem lies in under-resourced courts, particularly at a magistrates' level, and one has to ask questions

of the Department of Justice rather than the judiciary as to why this inefficiency exists.

With regard to the question of the Judicial Service Commission, its role is to conduct hearings and at the end of the day make decisions as to which judges should be appointed to which courts. In the case of the Constitutional Court, they make recommendations to the President who then makes the ultimate appointment. We can also say that in a sense it is the body that is supposed to discipline judges. But it has no powers of subpoena, no powers to enforce people to come to give evidence before it because there is no proper disciplinary piece of legislation.

Finally, I want to make it perfectly clear that when we start attacking this judge or that judge in public, I do not think it is helpful. Of the people with whom I work on a day-to-day basis, everybody tries their hardest under very difficult circumstances. We have a very poor set of working conditions, where computers break down consistently and we have libraries that are not resourced to the extent that they should be. In our court we are lucky to have five or six researchers for 27 judges. Most courts have no researchers other than the Constitutional Court and to some extent the Supreme Court of Appeal. Judges work under appalling conditions and under huge levels of pressure. I go home everyday and I thank goodness that I have not made a mistake. It is a stressful job. Anybody who wants to come and shadow me or any of my colleagues for a day, you will see the level of stress that ordinary judges face. We are subject to great disservice by people suggesting that we clock in at 10am and go at 4pm.



Of course the system has not worked perfectly. Some appointments are not necessarily the best. People may say that about me, quite frankly. Given our legacy and the judges that were appointed under the National Party, it is a bit rich talking about criticism of the bench today. However, to simply equate race with transformation is also profoundly wrong. One day we will get to a society where we can transcend race and where I make a criticism of you or you of me, it is made and we will take it for what it is: a criticism. Not because you are black or because I am white, but because we are human beings. Ultimately, I am absolutely convinced about this, until such time that we sing from the same song sheet which actually says to us that the humanity which unites us is more important than the racism that divides, we will never have a constitutional democracy properly. To paraphrase Mr Obama: 'Yes we can'. We can get there and we will. That is what the struggle is all about, to get to the point where we can make the Constitution work to transcend our history. I accept it is difficult and will take a long time, but that is the direction in which we have to go.

## **Rhoda Kadalie**

I believe it is a human rights violation when we inflict untrained people on the public in the same way that we inflict the untrained pilot, doctor or engineer on the public. So if we have a bad judgment, the criminal is let loose because of inefficient work and that person harms another person, the consequences one feels immediately. So that is my one point about affirmative action. I think that the Black Lawyers Association must stop

moaning. What we need in this country is for us black people to say that it is time we beat the whites at their own game and become better than they are. It is too easy to play the victim game. It is too easy to say that we do not have good equipment and offices. Then organise yourselves as a union and get better equipment, get better trained, work harder and become good judges. As a black person, the time has come to say: We are governing this country, Mbeki had the world at his feet and he messed it up. We are in charge and we have to rule and govern efficiently and properly. We can do it, yes we can.

## **Somadoda Fikeni**

Transformation is not something optional; it is something that we must do. Of course competency is important. But I think we ought to take very seriously the point that has been raised about social stratification and how the judiciary responds to some of these cases. But we also need to reflect on the response by the media or the public, which has to be consistent, regardless of who is on trial and whether the person is rich or poor. In speaking truth to power, we need to speak to all centres of power, including government, the corporate world, the media and so forth.

Regarding the issue of transformation from a liberation movement to a modern party, one has to recognise the changed conditions. Previously, under apartheid, the enemy was very clear. But once you are in government, the environment is more complex and you cannot continue to see things in a conflictual sense. And once you are a governing party, you need to understand that it is not only your party that matters. Be it in the naming





of streets, with respect to deployment and so forth, you are raised to a level where you think of public interest beyond the party lines. This means that one has to understand the relationship between the party and the state, which are defined by the Constitution. Then there are the contradictions within the alliance. One corner wants to have a socialist state, without necessarily articulating a particular model. The one section would like to

preserve the rights of workers but once you become a governing party, you become employers. How do you deal with those contradictions? Another issue is the notion of democratic centralism, which was a response to specific, precarious conditions of exile. But in a decentralised environment where you have to promote a multiplicity of voices, can you still maintain that without suffocating open competition of ideas within the party? ■





## SPEAKING TRUTH TO POWER: POLITICS AND JURISPRUDENCE IN A YOUNG DEMOCRACY

6 NOVEMBER 2008

CENTRE FOR THE BOOK, CAPE TOWN

### ABOUT THE PANEL:

**Justice Dennis Davis** was appointed to Judge of the High Court in 1998, a position he still holds. He is also Judge President of the Competition Appeal Court since 2000. Prior to his appointment to the bench he was Professor of Law and Director of the Centre for Applied Legal Studies at Wits University (1991-1998); between 1996 and 1998 this was a joint appointment with UCT, where he still is an Honorary Professor. He has authored and co-authored numerous books, articles and op-ed pieces for local newspapers. He has also been a TV presenter on national TV of shows such as Future Imperfect, Constitutional Talk and Judge for Yourself. For the past twenty years he has been the Honorary Director of the Society for the Abolition of the Death Penalty.

**Rhoda Kadalie** is Executive Director of the Impumelelo Innovations Award Trust, which was established in 1999 to reward innovative government and civil society initiatives that improve social service delivery. Impumelelo publishes case studies featuring award-winning service delivery initiatives, and uses the material to train and educate public officials to replicate these success stories. Between 1995 and 1998 she was a Human Rights Commissioner with responsibility for the Western and Northern Cape. Prior to that, between 1976 and 1995, she was an academic teaching Social Anthropology and later became founder of the Gender Equity Unit at the University of the Western Cape (UWC). She serves on a number of Boards and is a well-known national and international speaker and columnist. She is a guest columnist for the Business Day, Die Burger and Beeld.

**Dr Somadoda Fikeni** has a professional background as a teacher, academic, author, policy analyst and social commentator. Until recently, he was Chief Operations Officer with the National Heritage Council (2004-2008). He currently is an Expert Consultant for the Human Sciences Research Council and Director in the Eastern Cape Development Corporation. He serves as an advisor to and board member on several community development organisations and projects.



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