

“Has South Africa become a juristocracy? Or who runs the country?”

Dennis Davis
Judge of the Cape High Court

Harold Wolpe Memorial Trust open dialogue
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T H Barry lecture theatre, Iziko Museum of Cape Town

TRANSCRIPT OF QUESTIONS AND DISCUSSION

Dr AnnMarie Wolpe opened the evening by welcoming the audience. Dr Wolpe mentioned that *The Round Table* had been nominated for a SAFTA Award, and thanked Heidi and Tracy, at the Trust, for their excellent work. Introducing the speaker, Judge Dennis Davis, Dr Wolpe explained that a review of a new book by Ronald Dworkin, Judges in Robes, had been the inspiration for the topic of this open dialogue.

Judge Davis presented his paper and then took questions and comments from the floor.

Speaker

You mentioned notion of deliberative democracy. How is that different to conventional representative democracy?

George Ellis

It seems to me that when you get a law, what you are getting is a product of deliberation, and that should be accompanied by a record of the discussion leading to the shape of that law. That record could then be used in interpreting that law.

Harold Smith

Have you reflected on how the current Helen Zille controversy would be viewed in the context of a rights-based constitutional democracy?

Solly Moeng

You referred in your talk to apartheid jurisprudence. Frequently, when we look at current rulings on bail, we wonder whether the judiciary lives in the same world as the rest of society. To what extent is current interpretation of law trapped by judges trained during apartheid? To what extent are they refusing to accept that the context is now different?

Dennis

1. I'm not suggesting that a representative democracy is devoid of deliberation. My point is that deliberation should take place at many sites, not just in parliament. If it is just occurring at parliament, you end up with an ossification of parliament, and no vitality in discussion at all. What Judge Ngcobo was saying in the *Doctors For Life* judgment, was that what you really want is as many open-ended public discussions as possible - and that was our initial democratic model. Voting every 5 years is not enough – that by itself is not the kind of democracy we want.

In terms of institutional viability, it will be viable only if the three components (the legislature, the judiciary and civil society) are running at same time. It is saddening to see that civil society action is very sparse at the moment, except for one or two very active movements like the TAC.

If you, as a movement, are organised, you can bring about change. People often say things like: "All the courts care about are gay and lesbian rights" – but that is because the gay and lesbian civil society movement is working so hard to put those issues before the courts! Unfortunately, many other groups of people are simply not organized.

2. Many years ago in the House of Lords case, *Pepper v Hart*, it was accepted idea that Hansard (a literal transcript of the Legislature's deliberations) was acceptable as evidence in interpreting the text of legislation. It has never been seen here, I don't think. Bear in mind that it's not just judges who can bring in evidence as to interpretation of a statute – lawyers can too, in fact it is their job to place that evidence before judges. They can be quite creative in what they place before us to help us interpret.
3. I'm afraid I won't answer on the Zille debate! (*laughter*) The dispute may well come to the Cape High Court, so I don't want to answer that question.
4. I'm not here to defend every judge, I defend only the institution. Judges do make mistakes, often - but when we make mistakes there is, at least, a right of appeal (unlike with doctors, I may add)! I think some judges *are* living in a different world; I accept that that may be the case. I certainly wouldn't suggest that every single judge has rushed headlong into embracing the transformational project.

But I do think that increasingly, the cases where black life is regarded as less than white life are becoming a minority at the judicial level. Clearly there are greater problems at magistrate level – but magistrates and judges not the same. As we move further into the judicial appointment procedures of the twenty-first century, we will have fewer and fewer of these kinds of decisions.

You raise the point as to what kind of judge we should appoint. Race and gender are necessary conditions for selection of judges, but not sufficient conditions. We are finally getting a more sophisticated training programme off the ground, and that will help as well.

Let me make two final points: when you have a crime wave like ours, the judiciary is under massive strain. A judge is required to balance the rights of an accused with the justifiable claims of society in general and victims in particular. Under that kind of pressure, mistakes are made. I myself have often agonised over bail decisions; they can be very hard to make. Finally, you are correct: values make a huge difference and that is why, when we appoint judges we should have a proper debate about the appointments. That debate must be one where the public participates. I believe all interviews of judicial applicants should be on the radio. Then the public could comment meaningfully on those applicants. The media has not served us well in this regard.

While I'm talking about the media, I should say that generally the press does an appalling job in the reporting of cases – they twist and alter them unacceptably. We should have a far higher standard of reporting on cases.

John Gosling

In terms of the Constitutional Court, the Constitution and a participatory democracy - the CC has handed down a decision on gay and lesbian marriage. The Legislature has decided to offer a bill, inviting public participation, with a commission holding public hearings. At those hearings, the majority expresses the view that same-sex marriage is undesirable. Who is going to make the final decision?

Mervyn Bennun

Your comment about what Judge Murphy wrote in the Cape Times - I found Judge Murphy's sentiments horrifying, and they terrify me. However, I think we need to refine our response to them – what exactly is making us so angry? I think the real problem was Murphy's call for changes to the Bill of Rights, and the call for a referendum to achieve that. We know that frequently judges appeal to Parliament to change legislation that judicial consideration has found to be flawed – there is nothing problematic about that. What *is* disturbing is that a judge sees fit to call for a change in the Bill of Rights.

David Lewis

What have we lost or gained in terms of self-authorship by not using a jury system? Surely a majority system requires that representatives of ordinary people have a role to play in judging others in court?

Patrick Melley

I've had some experience with political parties, and I think it's true to say that many of the smaller parties are working against the very objectives they're trying to achieve, because of their desire to be in Parliament. If they were to disband and set up a civil movement instead of a political party, they would probably achieve a great deal more. Freedom Front Plus is a prime example of a small political party who expends so much of their effort and resources on getting into Parliament that they have little time left to achieve other objectives.

Dennis

1. At the end of the day the CC will decide whether the Civil Union Bill meets the strictures it laid down in its judgment. I thought it was quite clear what the court said, and I don't think there's much room for the legislation to go beyond that, or fall short of that. We have seen the Parliamentary law advisor on TV a number of times, saying that he wasn't satisfied with earlier drafts because he's concerned about constitutionality, and I suspect that he is very alert to the fact that the Bill must meet the CC's requirements. If the Bill doesn't meet the CC's strictures, it may nevertheless be justified, but that is the CC's inquiry, and the burden will be on the Legislature to show why it is justified.
2. The only point I want to make is that you are absolutely right. What disturbs us is the mention of a referendum as the basis for a change of the Bill of Rights. Our job as the judiciary is to promote our constitutional democratic enterprise as best we can. It is not for judges to advocate referenda or other majority-rule mechanisms, which undermine a constitutional democracy.
3. Many years ago I wrote an article calling for a jury system. I was flush with the influence of EP Thomson, who had written eloquently that the jury system in

early England was one of the greatest triumphs of democracy. When I wrote that piece, John Didcott wrote to me in response and he said: juries don't give reasons, and reasons are important. We debated this quite a bit. I have always been in favour of a jury system. It would be a bold move in SA, but if we have faith in humanity, it could work. What is odd to me is that no-one has ever taken it up, since then. It's simply not an issue on the public agenda.

4. Small political parties have the right to be political parties - if they're not successful that's their problem. I actually think it's important that they're in Parliament. I think that at the end of the day, the whole point is to allow many parties to be in Parliament. Of course we must have some kind of threshold as to who qualifies as a 'party' that can sit in Parliament, otherwise it can become absurd.

Mpumelelo

I know of three judges now who have expressed regret that Constitution doesn't allow the death penalty. Two expressed that in handing down a judgment in a case where a boy had killed a family. They implied that if the death penalty were available, it would be the ultimate penalty.

There are three points there. It might be a bit of populism, since there's a lot of comment that a referendum on the death penalty would result in a 'yes'. The Constitution gives people some kind of freedom to express their opinion. But at another level, the Constitution prohibits the death penalty, and this was found in one of the first judgments delivered under our new Constitutional democracy. How do we balance these conflicting tensions and rights – the right to life and so on, but also the right to express your opinion as a judge?

Mike Tomlinson

The *sub judice* rule was introduced when we still had the jury system. Is the rule still relevant, and does it allow people to hide behind it?

Speaker

During the public hearings on the Civil Union Bill, one speaker made a comment to the effect that there will come a time when the CC itself will become unconstitutional, because Parliament is the elected body, and yet its hands are tied.

Speaker

I'm not sure as to your position on Judge Murphy's opinion. To what extent, in your mind, may judges engage publicly, and where do you draw the line with regard to judges expressing themselves in public?

Dennis

1. & 4.
On public opinion: I imagine that most people would favour the death penalty. The point is that the Constitution is not about public opinion. There are some values that are placed beyond the reach of public opinion, which is a transient and vacillating thing. We have to be extremely cautious with public opinion. I am almost certain that if the crime wave decreased, the cry for the death penalty would go away. That's what I mean about the transience of public opinion.
3. Of course judges are entitled to free of speech. But I, as a judge, draw the line on the basis of the oath I took to uphold the Constitution, and I believe

it's my job to uphold it in every way possible. I don't see it as my role as a judge to attack the Constitution. The group who is supposed to be the custodians of that document should not be playing that role if they don't support it wholeheartedly.

At the end of these 10 years, we are not out of the woods. Sometimes public opinion feels that CC itself has become unconstitutional, as someone mentioned. As judges, we must constantly repeat how important and precious that document is, because it reflects us as a society at our best. Judges must stand by their job as custodians. If I go beyond that line, I should be criticized.

I've seen many more judges coming out into the public arena and engaging with issues recently, and the public liked it. I understand that people may say, in anger, that one day we'll reach the point where the illegitimacy of the CC will cause us to throw the whole court out. I think we teach people the importance of a constitutional democracy by showing them that where they lose something, they gain something. If one right is denied, it makes it that much easier to deny the next one, until we have nothing left.

2. The *sub judice* rule: it's not a bad idea to have such a rule, although it's not always effective. It has been abused to a large degree. Given the way in which freedom of expression has been expanded in South Africa, there is far less of a restraint on speech than there was before.

Inge Lawson

I accept the philosophical highground of having no death penalty, but having one of my family becoming part of the statistics of people who have been raped, I must ask: how do we act to protect ourselves and what other solutions are we seeking to protect ourselves? I work in trauma counseling centers, and in my experience the true statistics of crime are being suppressed. What other solutions are we looking at?

Dennis

When you sit as a judge and you try these cases and see the families, it is very hard, especially where the police investigation is botched up.

Inge

I must interject there: I have a lot of sympathy for the police given the appalling circumstances in which they work, and I believe that not one of us sitting here could do a better job.

Dennis

I accept that, but what I am saying is that it's harder at one end where the other end is not working as it should. We do need to do something about our police force – they have to do better. The police, however, are only a small part of it. If you go into the old 'coloured and black' areas and witness that crushing poverty, are we seriously surprised that people get into drugs and gangs?

We need to reconstruct the residential and social structures of our society. Those issues are infinitely more important than reintroducing the death penalty. Another massive part of the problem is unemployment. The point I'm making is that the cry to bring back the death penalty is a pathetic cry, because it will not make much of a difference. It will not make the difference we want. To a large extent we need a

holistic solution to this, and to suggest that absence of the death penalty is the root cause of our crime is simply not true.

AnnMarie closed the evening by thanking the audience and the speaker, and by mentioning that the last open dialogue of 2006 will probably focus on the issue of crime, so that anyone interested in that issue should keep a lookout for the date and time of that dialogue.