

THE FUTURE OF OUR NATION - OUR NATION OF THE FUTURE: On Morality in Politics, the Law and Society¹

And I stayed here and I live here because I like it, quite frankly, and I think that we can make out of our country something wonderful and quite beautiful, in which eventually we can even integrate Gospel songs and have them sung well...²

In this extract, Langston Hughes the African American writer and poet was reflecting on the phenomenon of prominent black American artists, writers moving to France and making their homes there. This was in 1961, and the piece is taken from a remarkable conversation on radio that included some of that time's eminent writers, poets, literary critics and journalists, among others James Baldwin and Emile Capouya. They were talking about the black writer in American culture. At the heart of it was the representation of black life and aspirations in the emerging cultures of America and how authentic such representations were. During this conversation, Lorraine Hansberry, author of the novel, A RAISING IN THE SUN, put it crisply:

The question is being openly asked today among all Negro intellectuals, among all politically conscious negroes: - is it necessary to integrate oneself into a burning house? And we can't quite get away from it (Bigsby: 104).

Of course, that was the United States in 1961. It was a time of much anticipation, of the civil rights movement, of the Black Panthers, of Martin Luther King Jnr and of Malcolm X. Yes, it was also the time of John F Kennedy and of a nation approaching its own tipping point and carving out its destiny.

I guess there are many in our country today with similar feelings – of being and becoming, and not quite becoming what we desire to be. There is a similar sense of challenge and uncertainty. South Africa today is a world away from what it was a mere decade ago. In 1998 the mood was "When Mandela goes..." A doom scenario was painted, of a world without a

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¹ Address at the Annual General Meeting of the Law Society of South Africa to mark its 10th Anniversary held at Stellenbosch, Cape 31 March 2008.

² Bigsby CWE (Editor): THE BLACK AMERICAN WRITER; Vol. 1 Fiction; 1969: London; Penguin; 79-108.

future for white citizens, of economic management that would be alienating to the interests of capital, and of an assertive black nationalism. Somehow Nelson Mandela was being abstracted from his own political party and the programme of the liberation movement, and Thabo Mbeki would reverse the gains of reconciliation. Yes, there may have been some who took the option of emigrating from these shores, turning their backs on their native land. But there were also many of us who stayed put and we said, echoing Langston Hughes, "we like it here."

10 years on, South Africans have survived the Mbeki era. In fact, by my estimation, Mbeki turned out to be among the best heads of state this Continent has ever known. He has brought intellectual vigour to the highest office in the land, and under his superintendence the economy has had the most sustained growth - some 36 quarters - until the recent events which arose as a result of a combination of factors, not least the downturn in the economy of the US, volatility of the oil market and, as we all know. ESKOM!!

President Mbeki has brought to the fore public policy about social cohesion: alleviation and eradication of poverty, strategies for enhancing jobs, driving the skills deficit, gender and race. We have seen spreading participation in the economy through interventions in the labour market, employment equity and Broad-based Black Economic Empowerment. In other respects, social policy has not, in my judgement, been a spectacular success. Education and health, as well as strategies for promoting the safety and security of citizens, evidenced in the apparently unmanageable levels of crime, come to mind. As far as HIV/AIDS is concerned, notwithstanding a comprehensive policy and generous budget devoted to this pandemic, the spread of new infections cannot possibly be attributed to the alleged denialism of President Mbeki. It is time that South Africans learn to take responsibility for the consequences of their conduct. Foreign policy has arguably been a mixed success, though President Mbeki as a diplomat is highly regarded by friend and foe alike across the world. Without any doubt the arms deal must remain the Achilles heel of the Mbeki Presidency.

We now enter a new era. It is a time shrouded in anxiety and uncertainty with the looming Presidency of Jacob Zuma and a new assertive leadership of the ANC.³ To many of us, Jacob Zuma, popularly elected by the branch delegates at Polokwane in December 2007, remains a flawed character in his moral conduct. He has been indicted for serious crimes that involve corruption and dishonesty. So far, he does not encourage confidence in his understanding of policy, appearing as he does in the short-term to be making policy pronouncements on-the-hoof depending on who he wishes to appease at any one moment.

³ I make no apology for basing my analysis of the state of politics in our country on the state of the African National Congress, because, like it or not, the ANC remains the dominant political force, and

its fate has become the metaphor for the fate of the nation. Some might accuse me, with justification, of falling into the trap of equating a political party, granted, one among many, with the entire political

system of the country. That is clearly not my intention, hence I make this explanation.

We have seen the leader flip-flop on crucial matters of policy, for example, the death penalty; the silence when his supporters mount a savage and uninformed attack on the judges ostensibly with his concurrence; the dance of back step on the reform of the labour market, and so on. The new ANC seems much more at ease settling scores, scrambling for positions or positioning themselves, than it does addressing the problems that confront this country: poverty, unemployment, social cohesion, crime, skills and technology.

And yet, it must be stated, the new ANC as a political party perhaps holds the promise of a new era in politics. Perhaps the ANC may present itself as a party of reform: a more popular and participatory party that respects the conventions of democracy and constitutionalism, especially the separation of powers, the independence of the judiciary and the integrity of parliament. It may enter into a new and vibrant relationship with the electorate rather than the electorate being seen merely as voting fodder during occasional five-yearly general elections. One hopes that the new ANC may have confidence enough to trust the electorate to elect their own President by direct election, and the representatives of the people by constituency vote. One also trusts that the new ANC will have the confidence to submit the election of any new President of the ANC to direct elections by card-carrying general membership of the party. To quote Langston Hughes again, that is a "promise deferred".

Notably, the first pronouncement being acted upon at the behest of the ruling party is the scrapping of the DSO (Scorpions). We understand that every obstacle is to be set aside to ensure that the General Laws Amendment Bill is piloted through parliament to give effect to such dissolution by June. That, of course, does not give much confidence to many of us concerned not just about crime, but about corruption as well, especially among the high echelons of the ruling party and others associated with the political elite of our country. One hopes that the same lightning speed could characterise job creation and anti-poverty measures; that it would bring about imaginative policies to bring health care back to the nation, an efficient and corruption-free professional public service, and schools that meet the aspirations of parents and assure the future of our young. We all wish to see a South Africa that is confident in itself among the community of nations and that excels in the competitive world, whether it be sport, entertainment, arts and culture, research and knowledge generation. Instead South Africans are in doubt, uncertain, hesitant, uncompetitive, and we have a South Africa that is attracting peddlers in drugs and prostitution rather than investors of repute, with many of our inner cities (CBDs) deteriorating as they have become the refuge of international criminal syndicates. So far we have no counter to such destructive tendencies.

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I make it very clear that I do not take a pessimistic view of South Africa at this point in time. It is not my view that the bleak picture I have just painted is the end of the story. That is

because I also believe that South Africans as a nation are very resilient, that they are capable of challenging wrongdoing from whatever quarter and are able to demand accountability from their leaders. That is what is most exciting about this new South Africa – the will to be truly free, the quality of the liberated spirit. I believe that what defines South Africans more in our day is not so much their sense of despair but their capacity to engage in dialogue – to talk, to challenge each other in seeking for the ultimate truth. There have been charges though, that since participating in political power, erstwhile liberation organisations have benefited from and dispensed political patronage like any other political class. Political patronage has tended to blunt criticism and to make the beneficiaries compliant. Likewise there have been charges about the creeping Zanufication of ANC under Thabo Mbeki - by this meaning that the ANC was becoming the party in the iron-grip control of the 'big man', the Chief. I am afraid that I do not believe that any of this has meant that South Africans are not an "argumentative" lot, a la Armatya Sen. At worst any seeming compliance probably hides a truly subversive character.

One must admit though that the politics of our time is untidy, messy, and complex. We may be aware to some extent that for the time being the ANC will remain the dominant political force in South Africa. However, we can never know who drives the agenda of the politics of ANC in the see-saw game of one-upmanship between various contending forces within the Tripartite Alliance itself. It is not too hard to detect that even among the victors of Polokwane there may be various tendencies busy positioning themselves for the inevitable should the Zuma Presidency come to nought as a result of the criminal processes he is being subjected to.

Even more significant, who precisely the dominant alliance of ANC Youth League, the SA Communist Party and COSATU represents within the broader movement, is worth watching very closely. I would argue as some political philosophers suggest that three streams are in contention: plurality, unity and sociality⁴. To what extent is the ANC remaining a broad church where various tendencies coexist maybe in a dialectical relationship? How in fact is a move towards enforced unity likely to become exclusionary and thus lose the essence and elements of the makeup of the party? But more critically, how does the ANC position itself to become the "sociality" of the nation it seeks to represent? Truth is that membership of the ANC is a mere minus 1% of the electorate, and yet under Mbeki the ANC increased its vote up to about 70% of the voting population. In other words many who voted for the party are not members of ANC. Is this the vote that a narrow sectarian party can hope to retain in changing and socially traumatic conditions, or are these mere fair-weather friends?

⁴ For a trenchant analysis of this theory, *vide* van der Walt Johan: *The Time of Reconciliation*, in le Roux Wessel & van Marle Karin (Eds): POST-APARTHEID FRAGMENTS: Law Politics and Critique; 2007: Unisa Press, pp1-33.

What is vital though is that the shaping of our society is grounded in a system of values. These values are set out in s.1 of our Constitution: "human dignity, the achievement of equality and the advancement of human rights and freedoms". But the values we espouse are not founded on some rarefied system of laws. Our values draw from our common cultural, philosophical African framework of identity, ubuntu, from the Judeo-Christian system many of us were brought up with, from the multiplicity of religious that have also variously shaped our moral consciousness, and the traditions of the liberation movement: loyalty, honesty, integrity and faithfulness. Without those the pursuit of the struggle would have been still-born. Indeed, these values were lived by Oliver Tambo throughout the years of struggle. For the majority of the leaders of our people, participation in the liberation movement required singular dedication and selflessness. Many had internalised a lack of attachment to material life save for those needs which could be met from a common wealth. Somehow we need to remind ourselves where we come from. We are now clearly able to see the inversion of values that Franz Fanon so eloquently warned about: "privileges multiply and corruption triumphs, while morality declines" (171). Fanon's analysis of the decay that happens to liberation parties post independence is as true of South Africa as it was of post independence Algeria, Kenya and Zimbabwe.

The moral foundations of our new democratic South Africa are set out in our Constitution. The Preamble states the purpose of the new South Africa to be unity, social coherence, social justice and fundamental human rights and "to improve the quality of life of all citizens and free the potential of each person". South Africans and society at large expect that what the basic law promised - quality of life, equality, human rights and human dignity - will be underscored by the policies adopted by government at all levels, the laws passed by parliament and the legal system executed and established by the courts. It also suggests that the common citizenry will become imbued with the values of the Constitution, so shaping their conduct one with another and informing their expectations in society. The South African system of law is shaped by the Constitution, as the supreme law of the Republic. The final arbiter and interpreter of the Constitution is the Constitutional Court whose judgments are binding on government and citizens.

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In exercising its jurisdiction, the Constitutional Court has had to be drawn into sensitive areas: about the extent and limitations of the exercise of Presidential powers; a guarded, maybe timid application of social and economic rights at the beginning, to a later assertive assertion of these rights in recent judgments; about moral consensus about the application of law in S v Jordaan on the consequences of the moral choices of prostitutes; about the exercise of equality assertively stated in same sex unions, and thus setting aside other moral claims putatively based on some contested moral claims of religion or African culture. It is easy to

assert that, as the history of the US Supreme Court shows, the moral and political shape of the Court will surely change with age, and that the influences that are brought to bear on the Court will differ and the accent of judgments may also change. It has been suggested that the Constitutional Court has been navigating this fine line between politics and moral composure with a sure touch that has retained the authority of and respect for the Court as an independent judicature.

I do not, however, accept the criticism that suggests that the Court has been able to navigate these narrow straits by reason of its assertion of the moral claims of dignity rather than the legal interpretation of equality. These critics suggest that the judgments of the court have at times been confusing, contradictory, individualistic, moralising. It is argued that the Court has at times failed to apply its own jurisprudence suggesting contextual application, substantive equality, and social impact.⁵ Of course, this is an age-old debate in jurisprudence between the legal positivists and the natural law proponents of law.⁶ There is, of course, a much more fundamental problem which most judges in our higher courts have not even begun to fathom. That is the impact of culture and cultural practices on the interpretation of the Constitution and the Law. I understand that we are awaiting judgment on the claims to succession of a woman. Could the Courts have considered more deeply the implications of same-sex unions on culture-defined traditions? Is it possible for the Constitution to remain culture-neutral?

I raise this issue only to suggest that anyone aspiring to become a head of state must understand the obligation that binds one to honour the spirit and the letter of the Constitution; to order one's personal conduct as if its is an open constitutional text, and to internalise its precepts as binding on one's life. That is as true of judges, as it is of ministers of the state and others who hold public office. Failure to do will discredit the Constitution and erode an essential seal that binds this nation, holds it together and inspires confidence. That is the reason South Africans should be very concerned when the ANC Youth League confronts the Deputy President of the Constitutional Court about remarks he is reported to have made at a private function, and when the sentiment about the integrity and independence of judges that is thrown up is clearly aimed at intimidating the judiciary. That is the reason that as a people we should be worried, very worried, when the integrity of judges is called into question without justification. We should equally be concerned when sitting judges appear to be behaving in a manner that is calculated to undermine the honour due to, and the status of, judges.

The Constitution and the Law: The fact of the matter is that when leaders behave in a manner that shows a disregard for the law, when leaders are indicted for serious crimes, when they

⁵ "The dignity based approach" writes Henk Botha, "is at least partly to blame for the moralism, individualistic conception of power and disregard for systemic inequality characterizing the majority judgment in *Jordan* – ..." in le Roux Wessel & van Marle Karin (Eds) op cit; p.166.

⁶ See my *Natural Law* Ethics in Villa-Vicensio Charles & de Gruchy JW (Eds): DOING ETHICS IN CONTEXT; 1994; Orbis Books Maryknoll & David Philip Cape Town, pp 48-61.

marshal supporters to demonstrate within the precincts of the courts, they popularise criminal conduct. And when political rhetoric is used as a shield to avoid or to stigmatise scrutiny, then they make criminal conduct and the defence of those under criminal investigation, a political project of the same virtue as fighting for one's rights. That is the same as electing convicted criminals to high political office by advocating criminal conduct as political, and thus making it acceptable to subvert the law. Or celebrating crimes by a certain class of criminals and turning entry into custody into a moment to be proud of.

Malcolm Gladwell⁷, writing about the manner in which New York City turned around the scourge of crime in the streets of New York warns against normalising criminal conduct, or mainstreaming deviance such that leaders by their conduct "give permission" to others to behave likewise. When leaders do that they numb citizens to aversion to such conduct and, indeed, make it a very attractive' cat and mouse' game - as long as one does not get caught. If that argument holds then rape and violence against women would not be an aversion; it then becomes but a matter of affording the best criminal lawyer and succeeding in casting doubt on the integrity of the accuser. The popularisation of certain types of crime puts paid to the statements about leniency on crime. The problem is not so much that criminals are 'lightly treated' by the criminal justice system, but that society has become so numbed by crime that citizens have become paralysed and unwilling to intervene – police do not receive assistance in their investigations from citizens – trains are set on fire by commuters, and no one will come forward to report the criminals!

On Intellectuals: I now turn to the consequences for a society that treats its intellectuals with disregard and scorn. I am afraid to say that the prevalent tenor of the nouveau political elite is the scorn heaped on the thinking classes. One noticed post-Polokwane the commentaries by the so-called 'independent analysts,' that Thabo Mbeki was 'cold and aloof, was an intellectual – and therefore 'clever' people have no place in contemporary politics. It has been suggested that there is no longer a place in our political life for intellectuals and that intellectuals were responsible for the parlous state of our politics. It is hardly surprising that so many young graduates have no desire to spend more time at university acquiring higher degrees. It also explains the paucity of enriching commentary by so many of our newspaper columnists. Even though universities are bursting at the seams these days with enrolments, there are actually far too many students who attend universities without a desire to advance learning.

In Cuba, Fidel Castro as early as the 1960s determined that the Cuban revolution would produce "men of thought; men of ideas". Castro understood that it was an essential part of the Cuban Revolution to produce a surfeit of critical and innovative thinkers who would become the bedrock of the revolution; in the economy, science and technology, the professions.

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⁷ THE TIPPING POINT: How Little Things Make a Big Difference; 2000; Abacus.

Above all, the Cuban government argues even today that the resilience of the Cuban system is due to the highly educated populace who are independent thinkers who could counterargue the American propaganda. I am reminded of an adage by Langston Hughes from the radio programme referred to above, that the greatest problem of America during the civil rights era was 'a problem of ignorance'. He goes on to say that it is not an ignorance of the negro as such but an "ignorance of a certain level of life which no one has ever respected" (94). Ignorance is not anything any society can flaunt and be proud of.

In one of his essays *Of the Training of Black men* WEB du Bois explains why education and training were crucial for the development of the black people, particularly their role in cultivating an independence of mind that undermined racial oppression. He says simply, the Negro College must "develop men" (66), to a "loftier respect for the sovereign human soul that seeks to know itself and the world about it; that seeks a freedom for expansion and self-development." Intellectual capacity is a state much needed for our human development and for the quality of our citizenry; it also cultivates a critical mentality that refuses to take anything for granted, whose claims are subjected to scrutiny to ensure their validity.

Racism, Xenophobia and Race Justice: My final point is about racism and racial intolerance. I shall not dwell on this, as so much ink has been spilt since the Reitz Koshuis debacle. I wish to observe that the generally parlous state of our race relations in South Africa has less to do with the headline grabbing events at Skielik or Reitz, than it has to do about the mutants of racism and its pervasive character in society. As a result, notwithstanding the political power which democracy has bestowed on the majority of the citizens, power relations continue to be skewed in favour of racial minorities in South Africa. Whatever category one looks at save politics, white people remain dominant; they continue to pool the hegemony of resources, intellect and ideas. Erstwhile white schools and universities remain the best resourced. White scholars occupy the pinnacle of productive scholarship in academia. The economy continues to be dominated by white capital notwithstanding BBBEE. Professionals in all categories remain best represented by white people. In sport South Africans appear to believe that the more white a national team is, the more representative of the sum total of talent available in the country - and meritorious - it is. We even have the spectacle too comical and banal for words were it not so serious, where players decline selection in protest against the exclusion of white players on race equity grounds. South Africans, especially the media approve of such conduct as heroic! It is therefore not surprising that the way of life and aspiration of the best of our young people is life associated with whiteness, and many who qualify from certain of our universities aspire to, and they immediately emigrate to, Europe and North America or Australia. Few devote their lives to social development and upliftment in public service.

That is not for want of trying. In 2001 South Africa hosted the World Conference against Racism. A follow up conference is scheduled for next year, again in South Africa. Indeed, the

SAHRC and government also held a national Conference on RACISM: A Nation in Dialogue a year before. Surprisingly there are few judgments on racism or racial discrimination in our courts, not even in the CCMA. The Equality Courts were established by PEPUDA, but to date such courts have not made much of an impact. In fact very few people are accessing its services. Once again, Henk Botha argues that even in the discourse of racism moral argument has had the effect of clouding issues, and as such proper consideration of the political approaches to jurisprudence. I wish to suggest that one cannot understand in what manner one differentiates moral from political. Power and its exercise in political environments do have a moral element. Botha argues, basing this view on American writer Kendall Thomas that

The political concept of racial justice that he proposes, resists attempts to ground equality in moral consensus or neutral principles, or to reduce it to individual dignity, personhood or (group) reputation. Instead, it seeks to ground the equal protection right in the Constitution of the United States in the values of equality and democratic citizenship.

He concludes by appealing to "dialogue" and political discourse which "precludes any particular consensus from ossifying into a 'final' understanding of social relations" (168).

It is my view that in South Africa there is much debate and talk especially in the public media, and radio in particular. Yet there is xenophobia against perceived foreigners, especially those from African states in a state of conflict, and they are subject to intolerable violence and physical abuse. It would seem that the Somali tradesmen and Zimbabwean shack-dwellers have no one in the community who dares to declare solidarity or to act in defence of the defenceless. We seem to have become immune to the soul destroying silence which translates into complicity, in a manner similar to the culture of 'turning the blind eye'. We have come to live with violence and hatred as if it is normal, as if it gives joy and fulfilment. Xenophobia surely does not produce jobs or houses people may not have; it does not make one a better trader in a township *spaza* shop. Like racism, xenophobia is the irrational hatred or prejudice against the "dispensable other". I have observed that I have seen no clergy in purple cassocks at *Skielik* shielding the victims from attack as one observed Archbishop Desmond Tutu doing during the times of the 'black-on-black' violence. I have no recollection of attorneys active in litigation against racism and xenophobia to any large degree comparable to the scale of the problem.

The peculiarly South African problem in dealing with racism and xenophobia is denial. South Africans are inclined to find alternative explanations for racism, or to counter-accuse the victims. South Africans tend to shut up real dialogue or debate about racism. Besides, and perhaps because of that, South Africans have no facility for the language of racism. There is a tendency never to debate or engage in discourse about racism in polite society. We have no Barack Obama in South Africa who fearlessly and without calculating, will address the manifestations of racism, its evolution and how it continues to bedevil racial equality. In South Africa we need someone to say with the Democratic Presidential hopeful Barack Obama that

"race is an issue that I believe this nation cannot afford to ignore right now." In fact in saying so, Senator Obama was echoing WEB du Bois who observed about racism in the Deep South

They cannot be laughed away, nor successfully stormed at, nor easily abolished by act of legislature. And yet they must not be encouraged by being left alone. They must be recognised as facts; but unpleasant facts; things that stand in the way of civilisation and religion and common decency. They can be met in but one way – by the breadth and broadening of human reason, by catholicity of taste and culture (56).

I must correct myself and say that President Thabo Mbeki has been a voice crying in the wilderness on these matters. And yet, addressing this issue can no longer be mere moralising. It is an imperative, a moral and social necessity without which social cohesion would be impossible and our democratic gains would unravel. If you do not believe, look at Zimbabwe - the reversals that have occurred there were beyond imagination a mere 8 years ago.

It occurs to me that one does not find many publications or books on the subject coming out of South African universities. I can only think of one last year, another by Dr BM Magubane, a retired social scientist, and an essay from the University of KwaZulu Natal. I can think of no reputable South African scholars on the subject. I am not aware of any course offered by a South African university on Critical Race Theory or studies, or academic conferences like the Applied Research Center's Facing Race conference in 2007. Writing in Equal Justice Society's e.newsletter (Summer 2007) Nicholas Espiritu A Triptych of race, Rice and Praxis: The Law and Social Change observes that - unlike South Africa, I suggest - he decries what he regards as the reliance by anti-racism advocates on the courts, as "critical legal thought has always held a sceptical view of the law's ability to ensure protection of insular groups and achieve social justice." He charges that the courts have not been "hospitable" to calls for redress by victims of racial injustice. He referred to an address by one of the senior judges of the 9th Circuit, Judge Steven Reinhart who called upon law students to effect a counter revolution in American jurisprudence, to fight "in the classrooms, in the congress and (judiciously, for the time being) in the courts." Espiritu concludes that

The lesson that we have to take from this is that we cannot abandon the terrain of the law and the courts, and we must continue the fight to reclaim them (the courts) as a place to create a vision of justice and equality.⁸

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It is my view that what obtains in society at large is often reflected in our courts and in the entire legal system. But actually, the courts are not and should never be mere mirrors of society. Lawyers are not simply reproducers of what they find in their social environments. Lawyers are critical readers, insightful observers and informed agents for change. The courts

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⁸ www.equaljusticesociety.org/newsletter

should always be in a position to call those in power to order without fear or favour; and the courts must be able to trust and rely on the integrity of lawyers to be fair and dispassionate about the truth and never knowingly to mislead in order to benefit from short-term gain. The legal profession is a critical partner in the administration of justice. I believe that all citizens should be assured of quality service regardless of the resources they can master; assured that they will be made to understand choices available to them if they are to make informed decisions; and that other solutions short of litigation especially if they are cheaper and save time, will also be explored. Indeed, lawyers can no longer be viewed as the rapacious scoundrels of *The Merchant of Venice*, who have no conscience but are mere fixers. In a constitutional system such as we have, law and the courts must earn a reputation for access to justice at affordable cost and within reasonable time. Can we make such a bold claim about our system? I doubt it.

To return to Langston Hughes, I believe that a legal profession that exhibits such professionalism and passion for this country, its future and its constitution; that recognises the excitement of shaping and creating this nation as we live it; that acknowledges the obligation not only to honour its constitutional values but to guard them jealously; that is motivated by moral understandings and readings of the dynamics of our society; and takes a critical approach to social practice, will never have to find a perch in some foreign lands and turn its back on the homeland. South Africa remains a land of promise provided that we work together to cultivate and bring such a future to fruition.

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Stellenbosch, 31 March 2008