This is an interview with George Bizos and it’s the 25th of January 2012. George, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate it.

Thank you for asking me.

...I’ve had the wonderful opportunity of interviewing you several times for the Legal Resources Centre Oral History Project, and we took an extensive biography, and you’ve also written a brilliant memoir. I wondered if, for the purposes of this project, whether you could share a very brief background and how you came to actually pursue a legal trajectory?

Well, my father wanted me to become a doctor. And I defied him (laughs). I chose to do law. I was radicalised at Wits University on the Student’s Representative Council where I served four terms. It was a difficult period; I became a student in 1948, the very year that the Nationalist government came into power. The student body was a mature body; many of the students, and particularly those in the leadership had either postponed or interrupted their studies in order to fight in the war. And they felt insulted by the victory of the Nationalist Party, albeit with a minority of votes, in having become the government of the country by people who opposed the war effort, and who made it quite clear that they would probably close Wits University, Cape Town University, and to a lesser extent, the Natal University, because they considered themselves as open universities to which black people could be admitted. I met Nelson Mandela, Doctor Mji, Doctor (Nthatho) Motlana, and others during my studies. They were members of the Youth League. We became friends, and I associated myself with what was happening in the early fifties, with the Defiance Campaign. And it was a period when you had to make a choice and because of my family background, and because I was a refugee from the war, I knew what side I should be on.

I’m also curious, it sounds to me being at the university at the time you were, there was a hive of activity, and in terms of associating with people who were not white, how did you manage that?

Well, it was quite easy for me. You know, being a Greek, the Greek national anthem is the Hymn to Liberty, because Greece was part of the Ottoman...
Empire and its people were suppressed, oppressed, and this is the history that I learnt in my primary school. My teacher was a refugee from Asia Minor. She actually talked to us about what it was like to have to leave your country, to be discriminated against. And a combination of things. My father who was a mayor of a small village, but nevertheless a progressive man, though before he became mayor in 1934 the village had no water, no electricity, no road on which a motorcar could go. Except for electricity he put the other things right. A single telephone in the schoolroom. And a dictatorship came into power in '36 and he was kicked out of office, as were other democratically elected office bearers. All this had an effect on me and when we arrived in grand style, ship in Durban, and I saw tall, strong black men with torn vests and one size fits all pantaloons, carrying heavy loads, provisions, to the ships, it had a tremendous effect on me. That is the sort of thing, as poor as we were in Greece; we never used people to draw heavy loads. It was the work of animals and not for human beings. So all that helped to put things together.

Int George, I was also wondering, in terms of your practice, you took on key political trials, I wondered whether you could talk briefly about the trials that you feel have been very significant?

GB Well...

Int I know all of them have...

GB Yes, well, you see, I really became well known as a student as a result of what happened...Doctor (D.F.) Malan the Prime Minister was asked in Parliament, what is happening at this university with all the protests that were going on? He said that he was in touch with the authorities and he was assured that it was merely a small number of leftists that were making the trouble, but well-mannered students would soon take over. We protested the next day in the Great Hall, and I shouted out...we had no microphones in those days...that if wanting equal treatment of my fellow students, irrespective of their colour, makes me a leftist, I'm proud to be one. The next morning a headline in The Transvaler, which had been edited by Dr (H.F.) Verwoerd, the apostle of apartheid, headline on the front page, links gesind en trots daarop. Leftist but proud, so said one George Bizos at the Great Hall at the University of the Witwatersrand yesterday. So, Nelson Mandela was a fellow student, he qualified after two years, I had to go for another four years before I qualified. He became an attorney. He was prevented from actually finishing his LLB by a racist dean who would not give him a supplementary examination. And all these things fired me up. And I'm sure that that front page of the Transvaler, the newspaper, was the first document in my Security Police file. And when I came to the Bar, Ruth First, the wife of Joe Slovo, found it easier to ask me to do pro bono political cases than her husband (laughs) which he did his fair share, but Ruth (First) didn't want to discuss...have pillow talk with Joe (Slovo) about. And my first political case was for (Eli) Weinberg who was a
professional photographer, previously a trade unionist, and banned. And he was charged with attending unlawfully a gathering in Sophiatown. His defence was that he didn’t attend the gathering, he had been asked by the New Age, the then left-wing newspaper, to take photographs of the gathering. He didn’t join the gathering; he photographed from the roof of a shack around the meeting. And I actually asked Ruth (First) that I’m sure that the police are going to lie and they’ll say that they saw him. And I was too green to take them on. She knew Vernon Berrange the great cross-examiner, would she ask him? She did. And Vernon Berrange agreed to come in and I was his junior. I did a memorandum for him on the law, that to attend has a wide different meaning, and this was not attending, and I finished off the memorandum with a sentence, that Mr Eli Weinberg was conspicuously absent from the gathering (laughs). He liked that, and we formed a very good relationship. He was a great cross-examiner, a great lawyer, and he made sure that I appeared with him in cases where there were good fees in order to make up for the pro bono work. And he repeated that with Duma Nokwe who came to the Bar later and Ismail Mahomed who came even later. We were his three favourite juniors, which proved very helpful. And for a greenhorn like me to be given the (Eli) Weinberg charge, one of the first charges for contravening the banner order, was given wide publicity. And all of a sudden everybody asked, who is this Bizos? The people from the university knew about it, and I was a clerk of an attorney, and I was known because I served almost four years in that capacity. So it was a good start of a career.

Int George, I was also wondering…through your association with the ANC, did you get a sense that apartheid would end when it did in 1990? Perhaps towards the late eighties?

GB You know, the people in the ANC were very optimistic. Particularly after the Macmillian the ‘Winds of Change’ speech. A slogan was developed, three years. In three years it’s going to be all over. Well, it took much longer than that. But the people that I associated with in the African National Congress, the people in the Liberal Party, the Congress of Democrats consisted of whites, to a lesser extent the Congress of Coloured People, because it was really a Cape organisation…gave me a lot of optimism that freedom would sooner or later come. And I was encouraged in that belief by the optimism of people like Nelson Mandela, Oliver Tambo, Duma Nokwe, with whom I was close. I finished up unlawfully occupying the same room in his majesty’s building with Duma Nokwe. I was encouraged by the leadership of the Bar in what I did and I was assured that if there was a charge against me or the landlord or the Bar Council, they would stand by me. And it gave me hope that sooner or later things would come right. But they took much longer than anyone thought.

Int When things did come right in 1990, what are your memories of that moment and the release of Nelson Mandela?
At the end of '89 after the Delmas Trial, which lasted almost four years, Arthur Chaskalson and others, thought I needed a rest. And on their initiative I was invited to Columbia University to take part in a programme of legal responses to apartheid. Prematurely at the end of '89 we met outside Oxford about a sort of Bill of Rights that there should be for South Africa with ANC people. Four judges including John Didcott and John Milne from Natal and two others came to that. And the Minister of Justice sent a telex at the time saying that it was unbecoming for judges to attend a meeting where the ANC was. And John Milne being the senior judge, sent back, “we are judges, we are independent. It’s not for the Minister of Justice to tell us how we should behave”. And when I was in New York on October the 10th, when the UN celebrated the Human Rights Day, I was asked to speak to the Assembly. It was arranged by the ANC office, I think, in New York. And the erstwhile president, he was president of the Assembly, said that he was at the meeting on the 10th of October, 1963, when there was a call for the release of political prisoners. And here he is in 1989 and that has not happened. In the morning papers there was a small report that Walter Sisulu and six others had been released. I put away the notes that I had prepared for my speech, I said, “Mr President, you’re quite wrong, these people have been released, and it can’t be a long time to come when Nelson Mandela will be released”. I was in touch with Nelson Mandela, I visited him regularly on the island, and I was also his go-between with Oliver Tambo in Lusaka and London, in order to reassure them that Nelson Mandela was in control. They were concerned that because of his isolation in Pollsmoor, taken away from Robben Island, he might weaken and he might make some mistake, because they were making offers that they will release him and he must go to the Transkei for a while, and that sort of thing. And they also tried very hard to create a division between Nelson Mandela, they’d say, you are the leader, these communists and terrorists outside, disassociate yourself from them and we will release you. He wasn’t going to fall for that. So that in answer to your question, I had just come back for a trial in the beginning of February, 1990, and I couldn’t go down when it was announced that Nelson (Mandela) would be released. Incidentally it is well documented that he actually said, I will decide when you can release me. And he postponed it for a week because he said he was not ready. What he really meant was he wanted to give an opportunity for the people outside to organise what sort of event it was going to be, which proved very…Dullah Omar, of course, had a very important role to play, as the attorney, because he was nearer to Nelson (Mandela) than I was in Johannesburg, but we communicated regularly. And I had to watch it on television. I was sitting down and jumped up for joy as soon as President De Klerk mentioned that he is going to release Nelson Mandela and he’s going to unban the ANC and the other organisations declared unlawful. And I had to wait until Nelson (Mandela) came to Johannesburg. I went there on the Sunday morning, the following Sunday morning, and we sat under the peppercorn tree, his home in Vilakazi Street in Soweto, and there was a family lunch. He asked me to stay and I said, no, you’ve been away from your family, keep it for the family. Arthur (Chaskalson) and I were invited to sit with the VIPs for the...at the
meeting in Soweto, the football ground, and there was an announcement that Arthur Chaskalson and George Bizos must please come to the platform. The announcement was made by Cyril Ramaphosa. And we went and sat with the ANC leadership on the front row of the stage where he made a speech. And I then...I had already been appointed, even though I was never a member of the ANC, deliberately so, not because I didn’t want to be thought not to want to associate with them, but there is a professional rule that you can’t appear in court...you should not appear in court, for an organisation of which you are a member because you may compromise your independence, in relation to the conduct of the case. So, he came to a small boardroom...the ANC had no premises at the time...he came to the room, he thanked us for the work that we had done, in relation to the Bill of Rights and sort of Constitution that we wanted, and he characteristically said, write a good Constitution, good not only for the ANC but for the country as well. And write a Constitution where if we do lose the first election there will be an opportunity for us or others to win the second. That was really the credo of Nelson Mandela, even so shortly after his release from prison.

Int I also wondered, you were on the ANC committee that was examining Constitutions in other countries, and I wondered whether you could talk about that process?

GB Yes, the debate in South Africa was...the Nationalists saying, yes, we can have human rights, but collective rights. We said, no, we wanted individual personal rights, in addition to communal rights. And this apartheid idea that the Zulus can sort of semi-govern themselves, and the Xhosas, and the Coloureds...they had formed the Tripartite parliament. We were determined that there would be a proper democratic constitution with an enlightened Bill of Rights. Whilst I was in Columbia I actually studied what were called the Federal Papers, which were the papers...and there was not agreement by the leaders of the people that formed the United States. There were different ideas as to what sort of Constitution we should have. We were guided by that, I studied them and I was able to make a contribution. The committee went to Germany, Karlsruhe, where the Constitutional Court was. Spent three or four days, spoke to the judges, were influenced by some of the provisions of the German Constitution, particularly the term of office which was nine years, the fact that they couldn't take government jobs after their term came to office. But they had a procedure that anybody could write a letter to the Constitutional Court and that they had a staff of forty lawyers to actually answer the suggestions that were made by ordinary people as to what the court could possibly do for them if they felt that their human rights were violated. They gave us their time and it was quite impressive. We went to France...the leading judge, when we showed him a draft, a human rights draft, he said they were too long. The right of man of the French is less than a page. And we inaudible and make it so long and it's so detailed. And he jokingly said, "The only thing you have not said in your Bill of Rights that the rubbish have to be collected every Thursday morning" (laughs). And one of the younger judges,
his retort, “Oh, I now know why there isn’t an efficient rubbish removal in France” (laughs). But we studied the American procedures, we studied the Constitutions of the Nordic countries. We travelled so much that the SWAPO people who were already in government by then and who had written a Constitution and a Bill of Rights for themselves, said, what are you guys going all over the world...they actually used the word ‘Boere’...we know what the Boere (Afrikaners) are going to do to you, is what they did to us, like giving blanket amnesty to all the perpetrators in the army and the civil service, and that you couldn’t sack anybody who had served the regime. And Toivo Ja Toivo, who was our host, he was the main accused in the Tuhadeleni trial, who shocked the judge who said in his opening statement, my Lord, we are in a foreign country convicted by a judge who is a stranger to us. This offended the judge. It had its consequences for me because Judge Ludorf started a rumour that I was really responsible for that statement, and using the derogatory k word said, they don’t speak that sort of English. And its Bizos’ doing. In fact, it was Ernie Wentzel that actually suggested these words to Toivo Ja Toivo. But that encouraged the Security Police to spread a rumour that I was the successor of Bram Fischer as the leader of the underground, which was quite false. And we took note of everything that we heard. We debated it. There were twelve of us, Arthur Chaskalson, Dullah Omar, Richard Mabandla, Professor (Kader) Asmal and with his chain smoke and his flint all the time, at the window puffing out (laughs). But he was a very useful member, because he had taught in Ireland, and was a good constitutional lawyer.

Int George, how did...all these visits and the feedback that you received, how did you then filter it into the actual Constitution making process?

GB You know the suggestion that it was a bunch of lawyers who went in this small dark room and wrote the Constitution is quite wrong. The ANC arranged provincial and regional meetings throughout the country, and we went from one one-star hotel to another, and spent a couple of days. And people would be called, an open forum, and we would discuss alternatives with them. For instance, what sort of president do you want? Directly elected like the United States, or France, or elected by the Assembly or after an election? Do you want a president and a prime minister? And there would be debate and the asking of questions, such as, we don’t want the American system because there the man that’s got the most money is elected. We don’t want that. and we don’t want him to have a prime minister because there will always be conflict between the president and the prime minister. He must be president as the leader of the country. We would take that into consideration. What sort of voting system do you want? First past the post on a constituency basis, or a national basis? And, you know, the people would ask, comrade George, what is this proportional representation? And try and explain it at the various forms. You know, they were people with a sense of humour, and I recall that in the Free State a young man...turned out to be a young school teacher, coloured school teacher, he said, what system do we have, how do you
describe that? I said “It’s what’s called the first past the post and a constituency basis”. He said, “is that the system that the Boere (Afrikaners) had?” Yes. “And with that system, they trampled us down?” Yes. That’s what we want. Now, comrade, let me tell you something, on the first past the post, you’ll get ninety percent of the vote in Umtata. You will get forty-nine percent of the vote in Pretoria Central. Now, forty odd percent of the vote will be wasted, and the forty-nine percent would be wasted on a proportional basis. You would get one member of parliament in Umtata, and one member of parliament in Pretoria, which would not be on your side because you've got only forty-nine percent. But in proportional representation on a national basis, you'll get two. Ah! That's what we want. And I would say, you know, I would say that there is a mixed system but it's a little difficult particularly for the first election, we wanted an election as soon as possible. And we didn't have time to have a delimitation commission and have constituencies. And that's the sort of way in which the Constitution was written.

Int  I'm curious George, what were some of the tensions and the last minute hiccups and negotiations that you may have been aware of?

GB  You know, in order to satisfy, particularly the Nationalist Party, it was agreed that the Namibian situation should be copied in part.

Int  The amnesty?

GB  Well, no…I'll deal with the amnesty, but in relation to what sort of Constitution. The United Nations said that the Constitution, they would be certain principles and they set them out. This was picked up by those people who predicted that the ANC would have a majority. And they agreed at CODESA…we agreed at CODESA, on thirty-four democratic principles, which any constitution that was passed by a parliament, which was assumed to be an ANC majority, it had to comply with those thirty-four principles. And an Interim Constitution was agreed upon, having regard to those principles, but the ANC in particular said, we do not want a Constitution, which the duly elected representatives of the country have not passed. This is why we had the Interim Constitution with some of the principles incorporated into it. And these were debated at great length at CODESA and the parties agreed that each party, each of the main parties, would appoint one or more of their representatives to a committee of nine, that were going to vet the Constitution that was to be passed by the duly elected parliament. Which is the Constitution that we have in the main. And they worked very hard. And they chose people, good lawyers, and I, together with other members of the ANC, attended some of these meetings in Cape Town, at which the nine members and political representatives were…I did not know Zak Yacoob until he was appointed one of the counsel in the Delmas Trial. I asked John Milne, the Judge President, when I heard that he would be one of the team, at a conference that we were at, John, what is Zak Yacoob like? I'll never forget his answer. He said, when he first appeared before us in
an appeal, we thought how is this man going to manage being blind? John Milne said, after half an hour we forgot that he was blind. So I remember in one of the parliamentary meetings that I went to. They would sit, not an eight-hour day, they would sit in the evening and I was in Cape Town on LRC business, so I decided I would attend the evening. And somebody made the proposal that the draft should be amended, and he said what the amendments should be. And there was a response from Zak Yacoob. He said, that would be contradicted by paragraph 39 4a little one (laughs), elsewhere in the draft. And he went on, and he was one hundred percent spot on. He played a very important role. Yes. And then eventually the Constitution was agreed to, with a yes vote of approximately eighty-five percent of the elected representatives. The others did not really vote against. The IFP (Inkatha Freedom Party) had reservations about the Constitution as a whole, because they wanted a sort of federalist state bordering on the KwaZulu-Natal independence. Their constitution, in fact, which they proposed, should be a provincial constitution, was buried, because the Constitutional Court when they tried to have it ratified, found forty-two reasons why it could not be…it did not comply with the provisions of the main constitution, and they cautiously said, this is not to be deemed an exhaustive list. So…and the Christian Party objected to the Constitution because they said that it did not acknowledge that God was supreme in the Constitution. We were able to respond that the Constitution says God Bless Africa, it was not necessary to adopt their wording, with the provisions for religious freedom. So that was the Constitution making process.

Int George, I’m wondering in terms of the need for a Constitutional Court, what were some of the debates and the main premise on which the Constitutional Court was actually founded?

GB The highest court of the land was the Court of Appeal. It was manned, and I use the word deliberately because there was only one woman ever on it, and I think that her time had expired at the time that we had this debate. There was conflict among themselves. Chief Justice (Michael McGregor) Corbett who had welcomed a constitutional jurisdiction in the Court of Appeal. The majority of the judges said now they did not want it and didn’t give reasons. Arthur Chaskalson is a very polite man and a non-confrontational man, as everybody knows. There was a meeting at Unisa where those opposed to constitutional jurisdiction for the Court of Appeal were the majority represented by Judge inaudible... Johnny de Lange who was the...not the Deputy Minister of Justice then, but in the Justice Committee in Parliament, said I’ve got a question, Judge inaudible why don’t you want a constitutional jurisdiction for your court? His answer was, I’m not here to answer your questions, Mr de Lange. Arthur Chaskalson was there. He said, “Why don’t you want to answer it? Are you embarrassed with the answer that you would have given, that you really are concerned about your decisions being overruled by another court?” Which was quite strong statement to make, but Arthur Chaskalson just couldn’t take the…and having regard to what we had learnt from the Germans, the French, the Americans, other democratic countries, we thought that the new Court
was called for. And it was incorporated in the Constitution. I chose not to take any political office offered, and when I was asked why I sometimes give the answer, I resent being given orders by anyone. And I discussed it with Nelson Mandela who was a friend and a colleague of the past, and he asked me to specifically to take an appointment from him as one of the four representatives of the President on the Judicial Service Commission. He told me that I was a senior member of the Bar, the Bar was divided, the Court of Appeal was divided, and that we needed someone on the Commission, who was familiar with the people concerned, and I accepted that position. And I served fifteen years.

Int On the JSC (Judicial Service Commission)?

GB On the JSC (Judicial Service Commission), yes, because at the end of the five years I thought it would come to an end but President (Thabo) Mbeki said, “No, you stay where you are for two terms.” His two terms. And my two terms. But it was important to appoint people who had a feeling for constitutional rights. The Judge President of the Court had to be appointed by the president. He had tremendous respect for Arthur Chaskalson and he decided that he should be appointed Judge President, not then Chief Justice, it was a Judge President. We didn’t want to rock the boat too much and then Judge (Michael McGregor) Corbett was doing quite well and I was deputed by Nelson Mandela to enquire that his term was going to come to an end shortly after the changeover whether he would be prepared to take an extension. I didn’t approach Judge (Michael McGregor) Corbett directly. I was sitting next to Judge (Richard) Goldstone when we were going to Pretoria by bus having parked at a parking lot outside Pretoria...to Richard Goldstone, and I asked him whether he would ask (Michael McGregor) Corbett whether he would remain Chief Justice until things settled down. And Richard (Goldstone) came back to me and said, “Yes, Judge Chief Justice Corbett will accept the extension.” And that was it and he was the presiding judge in the Judicial Service Commission. Arthur Chaskalson was his deputy on the Judicial Service Commission. The Constitution deliberately did not say that you had to be an attorney or an advocate or even have a law degree. You had to be a fit and proper person. We advertised. Over a hundred and twenty applications to become members of the Constitutional Court were filed. We had to do a sifting process. We reduced it, if I remember correctly, to twenty. There were politicians that wanted to become. There were nominations from churches with people with a religious background who thought that they wanted to be represented. And for the first time, the feminist organisations nominated women. We did public meetings in which the twenty that had been selected came to: professors of law, senior members of the Bar, some of the judges in the divisions, even though the judges themselves in terms of the provisions of the Constitution had a right to send four of their number, which they did. So it was only six that we had to appoint. The hearings were quite eventful. There was a lot of public interest, the media covered the question and answer interviews, the students at the University of the Witwatersrand protested
against two of the female professors that were nominated, for their own reasons. And I remember that they came with their placards and they were going to come at two o’clock when one of the professors was being interviewed. We apprised Judge (Michael McGregor) Corbett of this fact and they said that they wanted to see you to ask for permission to come in as a group and with their placards. He said, yes, of course I’ll see you. I don’t know why but I suggested to him, “did he want me to come with him?” He said, “George, no, I will handle this”. And typically of the man, he went out, they were in the Civic Theatre by the way, the hearings were, he went out, said, “Good afternoon, we have read your placards, it’s an open session, you are all…I think there are enough seats for all of you to come in. May I request to leave your placards behind?” They obeyed the request. And there were some highlights in the interviews. Kate O’Regan was asked by a conservative member of the committee, the Judge President of Natal, Howard, you want this job, Ms O’Regan? Yes, replied. How old are you? Thirty-seven. This is a very tough job that you are applying for. She said, “yes, I know that”. He said, have you got children? She said, “yes, I have”. “Who is going to look after the children if you get this job?” “I have a husband” (laughter). Albie Sachs was unnecessarily attacked by a man on the Commission, who was associated with the IFP (Inkatha Freedom Party), but Albie (Sachs) took it on the chin and things went on. But they…it was accepted generally as proper process carried out in public and that it was a useful thing. There were criticisms of some of our appointments, particularly in relation to Kate O’Regan, an associate professor, no Court experience, not a judge, why was she appointed? Well, I don’t have to tell you or the public at large, that it was an inspired appointment for which we all owe her gratitude.

Int I wondered, George, I’m curious about behind the scenes… you were privy to a lot of the discussions given your close association with Mr Mandela, President Mandela, and also Dullah Omar, and I wondered whether you could talk about some of the decisions and discussions that may have occurred about the appointments of sitting judges, the choice of certain people, and why certain people who were very important in South Africa’s legal history, have been left out?

GB Dullah Omar who was a member of the Commission in his capacity, as Chief Justice. Nelson Mandela never ever suggested to me or have any discussion with me who should be appointed or not. With one exception, the Chief Justice, or the president.

Int And that was Arthur Chaskalson…

GB He knew that I was very close to Arthur (Chaskalson), he was very close to Arthur (Chaskalson). He was very, very impressed with him, trusted him, and he knew that Arthur (Chaskalson) was respected by the judiciary, most of them, by the legal profession, as a person of the highest integrity and ability.
He had to consult the leaders of the other party before appointing the president of the Court. I think for the sake of history, I should disclose what I have not publicly disclose, something about this. An important person to consult was the then Vice President (F.W.) De Klerk. He and Nelson Mandela was asked a few questions about Arthur (Chaskalson), and (F.W.) De Klerk said that he didn't know (Arthur) Chaskalson well, he had to discuss it with his men. And that (F.W.) De Klerk came back and said he discussed it with his men, and his answer to the question put to De Klerk, what do you say about my appointing him as President of the Court, his answer was, even though he comes from your stable…De Klerk’s words…none of them had any objection to you appointing him. He probably asked his Minister of Justice, the lawyers, and Arthur (Chaskalson) was a very respected man of the profession as a whole, who had given up his private lucrative practice in order to found the Legal Resources Centre. And a man of integrity, something that South Africa has accepted and is grateful for his contribution.

Int Absolutely. George, there seems to be some tensions around the fact that Ismail Mahomed, whom you’d known for a long time, had perhaps understood that he may have been chosen instead. And I wondered whether you were privy to some of the discussions?

GB I was privy to some of the discussions. Ismail Mahomed was my friend, I knew his family, I think I was the last family member to see him and spend time with him at his deathbed. He was an outstanding lawyer and an outstanding individual. He was considered to become the first President of the Constitutional Court. And he did become a very important member, some of the outstanding judgments are in his…Nelson Mandela had a very difficult choice to make. He knew that possibly there may be criticism that he did not take an opportunity to appoint a black person. I have reason to believe that Dullah Omar actually wanted Ismail (Mahomed). What I think may have influenced Nelson Mandela, and he certainly didn’t tell me that, but I believe that because of the divisions that there were in the judiciary, he did not want a divided judiciary in the country that he was going to govern. And, that his decision may well have been that Arthur Chaskalson, who had an impeccable record as a contribution, as a lawyer, to fundamental human rights with his founding of the Legal Resources Centre, and the high respect in which he was held by the professions, both the Bar and the attorneys profession, may have influenced him to take that option.

Int In terms of the choice of the other sitting judges, I wondered whether you could talk about some of those choices and the decisions made of the sitting judges?

GB Well, they’d interviewed well…Pius Langa interviewed very well indeed. Albie Sachs, despite the attack that was made on him, was a very good member of the Committee that had helped put the Constitution together. The issue of
socio-economic rights was a difficult one. Albie Sachs was absolutely convinced that it was a matter, which should be provided for in the Constitution. That the Judicial Service Commission almost unanimously accepted. Yvonne Mokgoro was a good candidate. We were mindful of the provisions in the Constitution that we had an obligation in appointing judges to do so having regard to racial and gender issues, and she fitted the description well. Who else was there?

Int Tholie Madala.

GB Yes, he was actually not appointed by the Commission, he was one of the four judges, yes.

Int Four judges. In terms of those four judges, the choice of Johann Kriegler, John Didcott, Richard Goldstone, I wondered whether you could talk about them?

GB John Didcott was…

Int Yes, Didcott was not initially chosen, yes…

GB He was not initially…he was not initially. He was…yes…now, John Didcott was…I told you the incident with Jimmy Kruger…he was a human rights activist judge who was really needed. He interviewed well, he was brave, he was a friend of a number of us, including me, he couldn’t be left out. And he did well, even though during the…particularly the Certification (Certification of the Constitution of the Republic of South Africa) case where I was senior counsel, our friendship did not prevent him from hammering me (laughs). The same with Johann Kriegler, who was a friend, but he had been the first chairperson of Lawyers for Human Rights. And he’s one of the people who, when people make generalisations about Afrikaners, I remind them of Bram Fischer, Beyers Naudé, Johann Kriegler, and a few others.

Int In good company.

GB They too are Afrikaners, so please don’t make generalisations about anybody.

Int I’m curious, there’s been some debate in South Africa about some of the reasons for leaving out John Dugard, who was regarded as pre-eminent human rights lawyer. I wondered whether you could talk about that?
I think that John Dugard has been wronged. I think that he should have been appointed, not necessarily in the first instance...should have been appointed either to the Constitutional Court or the Court of Appeal. He was treated badly by the Bar. You know that the Bar Council has a discretion whether or not to allow lawyers who were not members of the Bar to appear with lawyers. They refused him permission, I don't know on what principle, from becoming a member of the team in the Tuhadeleli case, in which the four of us that were there knew nothing about public international law, and he had to do the work and the heads of argument but he couldn't dress in his robes and be part of the team. I admire him. He has written a book on human rights at the time when it was unpopular. He was charged criminally, and Sydney Kentridge and I appeared for him, for reading out a banned person's speech that was banned on the afternoon of the evening when he was supposed to present it to the Wits students. And he, without checking the Act, read it out. I must say to the credit of Magistrate Steyn, he pleaded guilty...John (Dugard) pleaded guilty, and he didn't want to hear mitigation, he said, for a professor of law to publicly admit that he had made a mistake is punishment enough (laughs) and he cautioned and discharged him. But he has done very well for himself, but I think it's South Africa's loss.

In terms of Dullah Omar's role, what was his role in terms of some of these choices?

Some of?

The choices of the judges ...?

He only had one vote on the Judicial Service Commission. You needed fourteen votes in order to be appointed, consisting of parliamentarians, provincial body, the Chief Justice, eventually the Deputy, the Judge President...senior Judge President, and professor, and he did not plug people to their appointments. The Judicial Service Commission that I served on was very careful whom they appointed. There were people who thought that they could get away with things. We made a couple of mistakes for which we are sorry. Well at least one of them I'm doubly sorry because had it not been for my personal intervention...I don't want to mention names...he would not have been appointed, but there was someone that actually wanted to reject him, what I considered racist reasons and I plugged for him. But there were some people who went and joined the LRC (Legal Resources Centre) or the Black Lawyers Association shortly before applying to be appointed. And they all would want to know...and one of them in particular, who had done nothing during the apartheid regime's rule, even though he was a member of the discriminated group, and I asked him, this meeting was in June, he joined the Black Lawyers Association in March, and I asked him, what was the urge that pushed you forward in March to join the Black Lawyers Association? And he said, you know, because now they don't have a job and they could have...I
said, oh, and did you take part in its activities between March? Yes, very much so, I think it’s a wonderful organisation. Who was the chairman of the Black Lawyer’s Association when you joined it? He said, Godfrey Pitje. He had died seven years before! (laughter) So, you know, we were careful, we were careful. But also we appointed people who did support the apartheid regime but who’d actually done things during the transformation period, which spoke volumes. One of them in particular who had served the apartheid regime, he applied to become a Constitutional Court judge, and he didn’t make it, but he came back later, not for the Constitutional Court. And I asked him, how do you feel when you have to adjudge a lands claim court case that you were actually part of the people that introduced this legislation? And he hit me between the eyes, he said, Mr Bizos, you were on the platform when Mr (Nelson) Mandela gave the first Bram Fischer lecture, as he said among other things, that when an Afrikaner changes, he changes a hundred and eighty degrees. This is what has happened to me. We didn’t pay much attention to words, but what he had done after…even before the elections, persuaded me…you know, he’d become a peace monitor in the various areas to try and control violence. And what he did in that work spoke volumes about his acceptance of the new values that were inaudible. He was appointed. So we tried our best and except two or three exceptions I think that we did quite well.

Int George, what were your memories of the Inauguration of the Court?

GB Well, Mr (Nelson) Mandela came to inaugurate it. Typically, he said, “the last time I was in a court I was there to get a life sentence (laughter). I haven’t been in a court since”. And proceeded to say what he expected of us. He spoke and there were refreshments, spoke to all and sundry, in fact, the case to be heard the next day was the death sentence case (S v Makwanyane and Another), and (Klaus) von Lieres und Wilkau, the Attorney General who was there, in his capacity as the Deputy Attorney General, in the Witwatersrand local division, and he told me that I had an advantage about the result of the death sentence because Mr (Nelson) Mandela (laughs)…he also said, waiting to hear…I was in court, waiting to hear whether I was to live or die. So he said that I had an advantage; these are the things that I remember. But there were a lot of people here, a lot of people, and I remember Tom Karis for instance, was writing a book about the Constitutional Court. And ambassadors and dignitaries, and even though it was in the temporary premises, the lobby was full of television instalment so that the people outside Court could follow the proceedings. And it was really the fulfilment of a dream of many of us.

Int George…I want to go on to talk about your involvement in the Makwanyane (S v Makwanyane and Another) case and the Certification ((Certification of the Constitution of the Republic of South Africa) case, and I wondered though if we could stop at this point and continue at another time?

GB Sure.
Int Thank you so much. This has been wonderful. Thank you for sharing your memories.

GB Pleasure. Thank you, yes, and any time, just give me a ring, and because those were important cases, and much of the credit actually must go, in relation to both cases, particularly to Wim Trengove. You know what he said in the Certification (Certification of the Constitution of the Republic of South Africa) case...I took the morning and made the general submissions, and I said the details are going to be (laughs) argued by my learned friend, Mr (Wim) Trengove. He got up and he said, it’s not the first time I’ve been hearing that laundry list (laughter).

Int Thank you so much, George.

GB Yes, thank you.
Interview 2

Int This is an interview with Advocate George Bizos and it’s the 31st of January, 2012. George, thank you so much for agreeing to participate in the Constitutional Court Oral History Project again.

GB My pleasure.

Int Last time we did an interview you spoke about your memories of the early days of the Court, and you shared your wonderful memories of that period. I wondered in this interview whether we could focus on some of the cases, which you brought forward to the Court, and perhaps we could start, with the first case, the Makwanyane (S v Makwanyane and Another) case.

GB Yes, Makwanyane (S v Makwanyane and Another) was the first case that was heard by the Constitutional Court. The Court had been opened officially by the newly appointed president, Mr Nelson Mandela. His dry sense of humour came forth because he sat on the Bench with the judges, with Arthur Chaskalson as the President of the Court, who said, the President is here, he needs no introduction. And President (Nelson) Mandela said, the last time he was in court it was to hear whether he was to live or die, in the Rivonia Trial, and he’s very pleased that a Court has been established. This led the Chief Prosecutor of Johannesburg, who was arguing the case for the prosecution the next day, he said rather drily that I had an advantage because of the President’s statement. It was a very important case. The counsel for the accused was Wim Trengove, and we...the Legal Resources Centre applied to make submissions as amicus curiae, which was granted. I argued it. It was for me a very important case. I was always against the death sentence and executions. I had a very traumatic experience in the early sixties when I was briefed to argue an appeal with three activists in the Eastern Cape, Mini and two others were sentenced to death. And I had to visit them at the jail where the condemned people were kept. It was a very sad consultation. We thought that although their conviction for taking part in MK (Umkhonto Sizwe) activities was...could not be challenged in appeal, but nevertheless they were really sentenced to death on one count of murder, for which they said they had no responsibility whatsoever. An informer had been killed and they got one witness to testify against them that it was their decision, and not that they committed the murder themselves. But they had decided that he should be killed. Which they denied outright. And the Court of Appeal, I think wrongly, dismissed the appeal, but it was a very traumatic experience for me, because I had to go back and tell them that the appeal had failed. They were executed and it was the early political trial out of the many that I did that a death sentence had been imposed. We had a very strong argument in political cases; if you did not sentence Nelson Mandela, Walter Sisulu, Govan Mbeki,
and others to death, how can you sentence the members of MK (Umkhonto Sizwe) who really were less culpable than the leadership. And the argument was accepted. Except in the Mini case.

Int I wondered, George, in terms of the way in which the judgments were written, as I understand it there was unanimous agreement; what was your experience when you read the judgments?

GB The result was not unexpected. Each of the eleven judges gave a judgment. An opportunity was taken by the Court, not only to deal with this particular case but for each of the judges to express his or her understanding of what the new Constitution was about. They were very carefully crafted judgments and for us it was not only the result that was important, but also the jurisprudence that was really expanded in the judgments, which served well for future cases. It was a pleasure to read them, they formed, I think, the basis of much of the teaching of constitutional law, and there are statements about the meaning of the Constitution, its importance, the definition of Ubuntu and other very important things that they said. The argument, or arguments, advanced by Wim Trengove and us, were, if I may say so, quite detailed. We dug into the history in order to rebut some of the arguments that we expected the representatives...there were no less than nine of them. The Attorney General of the Witwatersrand division got all the other Chief Prosecutors from the country, all eight of them to appear with him, and we did a lot of research to rebut the arguments that we expected: No mistake has ever been made, no innocent person has ever been sentenced to death, no innocent person has ever been executed. We dug up many instances where after the event, it became apparent that the...certainly the conviction was wrong, and in some instances, based upon the wrong conviction, there was an execution. And they could not really rebut the evidence that we put forward. We also rebutted the argument that their religious convictions supported the death sentence. We actually did unearth religious authority that was not so unanimous; they rely on the eye for an eye principle, but we would draw attention that in terms of the Old Testament, God gave amnesty to the brother who killed his brother, and God said, according to the Old Testament, that Cain was not to be touched. I was a member, and I still am, of an Italian based anti-death sentence organisation called, Don't Touch Cain. And we would draw attention to others that are...actually Albie Sachs raised the question that generally speaking, leaving aside the war situation in African tradition, people were not deliberately executed in terms of that, but they were punished by making reparations to the relatives, and he actually impliedly criticised us for not having dug up what the indigenous law would practise. And that was it about that case.

Int George, what do you think of the criticism that perhaps that (S v Makwanyane and Another) case and the fact that there was unanimous judgment, didn’t reflect the prevailing discourses that were happening in the society at the time
in terms of the death penalty? The fact that there were contingents of people in the country who really wanted the death penalty?

GB  The argument was advanced by the State that the people of South Africa were in favour of the death sentence and that if a referendum was held there would be an overwhelming majority. We actually counted the argument that in deciding what human rights are, the view of the majority, even if we assumed that it was correct, that the majority of the people, values are not to be adjudged on the basis of what the majority of the people may feel. And we were able to show, for instance, in the United Kingdom parliament abolished the death sentence, primarily because there was one case where six or eight years later after the accused had been executed, it was proved beyond doubt that he was innocent, because another serial killer came forward and said that he was responsible for the death of the person for whom Evans was executed. We were able to show that sixteen Sekukunes were sentenced to death. Fortunately they were not executed, because we unearthed evidence in a subsequent trial where the same witnesses gave evidence that the conviction was based on false evidence. The other that we were able to prove that public opinion actually vacillates. If there is absolutely horrible crime against a woman, a child, it’s a brutal killing, people bay for blood. If a referendum is held after an innocent person is shown to have been executed, public opinion would vacillate. And that it was in any event not a factor that should persuade the Court to keep the death sentence. The two persons that were represented by Wim Trengove, had committed an atrocious murder, which led the President of the Court, Arthur Chaskalson, that even the worst among us is entitled to the benefit of a fundamental human right to life. A passage, which has become a very important one, that the right is there for everyone, however bad they may be.

Int  George, thank you for that. I wondered whether you could talk about the very important Certification ([Certification of the Constitution of the Republic of South Africa]) case, how that process unfolded, why there was a need for that case and your involvement?

GB  Well, at CODESA, which I was part of a group…particularly the National Party and a few others, were very concerned that if there was an election the probabilities were that the African National Congress would win with an adequate majority, and they would write the Constitution. And they were afraid that the Constitution may not protect the people of the old regime, or the people as a whole, but be only for the benefit of members and supporters of the African National Congress. That was of course contrary to our instructions on the constitutional legal committee of the ANC. Mr (Nelson) Mandela came to see us at a meeting in a Johannesburg hotel, in a small boardroom, and told us that we must prepare a Constitution which would be good for all the people in the country and not only the African National Congress, and he added, make sure that even if we lose the first election, that in terms of the
Constitution we’ll be able to win the second. That was not enough for the people who were part and parcel of the old regime. And provision was made at the decisions of CODESA, that there would be a number of democratic principles which the new Constitution, which the ANC did not want to be written by unelected people but by after the first election, should be bound by certain democratic principles, which there were thirty-four of them, were in a document. We were influenced to a certain extent by what had happened on the United Nations’ insistence about Namibia. We were influenced by the fundamental rights documents of the United Nations of France and other democratic countries. And we agreed on these thirty-four principles. And the Constitutional Court envisaged in the negotiations was to decide whether any portion of the Constitution violated any one of the thirty-four principles. That was agreed to, and the Interim Constitution made provision that the newly elected Parliament would write a Constitution and that the Court had to certify it as compliant of those principles. The first attempt failed. We were sent back, because there were provisions in the Constitution adopted by Parliament the first time, which did not comply with the principles, particularly in relation to the powers of the provinces. It was said, half jokingly, that the only real power that was accorded to the provinces in the first Constitution was gambling. There were no police powers…and there were other provisions which the Court found unacceptable, particularly in relation to the emergency powers, which was, you know, we came out of the State of Emergency for the last four or five years of the apartheid rule. And there was a strong feeling that there should be no emergency powers at all. And we were persuaded that if you didn’t provide for emergency powers you would have a Lacuna, and what would happen as does happen in the United States, that the President says that I have in a State of Emergency powers to do this. And we didn’t want that. We were persuaded that it should be defined, that it should be confirmed by Parliament, and that it should be for a certain period and not permanent. And we made a mistake; the parliamentarians said that things could be done by the government during an emergency. It offended a couple of the judges, particularly Justice (Johann) Kriegler and Justice (John) Didcott, who made no bones about it. I had a very tough time in trying to justify it and I was in difficulties and they said, well, they’ll give us time to submit additional heads, which we did. Which did not help. The Court found that the emergency powers were unacceptable in a democratic society. There were a lot of people who wanted to be heard, the Court had to initially shortlist those, but there were some interesting ones. I don’t know why the Institute of Race Relations sent one of its members, or office bearers, to argue against socio-economic rights, which I found a little strange. But they didn’t succeed in their objection. I don’t remember the name of a small Indian religious and linguistic group, where the father of a child got his son to write in an Indian language, why he wanted his language to be preserved. And he was allowed to speak. A number of people came in traditional dress and animal skins. They were lawyers, but nevertheless they wanted to make a point and they argued that traditional law was not properly recognised. There were people who came to object about the provisions about the right to form trade unions, and also for them to have certain powers. The Court listened very carefully the first time, but held that
there were a number of provisions in the first attempt, which did not accord with the principles that were agreed upon, the thirty-four principles, and gave an opportunity to the assembly to come again, which they did. The financial powers of the provinces and the police powers were something that the Court found inadequate. But Cyril Ramaphosa who was the person that was guiding the assembly as the leader of the majority party...and he and others thought of instead of a senate having a council of provinces, which would have powers to oversee the budget, to also have original powers, to legislate and perform other functions. And that I think saved the day for the second time. Justice Ismail Mahomed said that we just passed the mark (laughs), which was a pass mark. Anyway, but the Constitution was confirmed by about eighty-five percent of the members of Parliament. The IFP (Inkatha Freedom Party) abstained, as did the Christian Party, who I think also abstained or voted against. But their objection was that the Constitution did not acknowledge the guidance of God in the preamble and that was an important omission. The Court I think correctly found that it does say Nkosi Sikelel’iAfrika, and that was a sufficient acknowledgment of a superior being. And of course it was adopted by the...well, the Court held that it was compliant. And this did not prevent people to this day, albeit a small majority so far, actually finding fault with the Constitution in a number of respects.

Int George, in terms of other cases subsequent to the Certification (Certification of the Constitution of the Republic of South Africa) case, what have been your appearances in terms of cases that you found that made a marked impact?

GB You know, I have done so many cases, I can’t remember any of sufficient import, except the last time that I appeared here as an amicus curiae in relation to the validity or otherwise of the extension of the appointment of Chief Justice Ngcobo Justice (Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others).

Int You worked with Adila Hassim on that?

GB Yes, with Adila Hassim on behalf of an NGO (non-governmental organisation). It was clear to us that the extension of the appointment was unconstitutional. We didn’t argue its constitutionality. But what we appeared to try and persuade the Court is that to say that it was invalid, but to give the government an opportunity to amend the section of the Act, which would have cured the invalidity. We failed in our attempt. The main reason was that the idea of having a Chief Justice performing the actions of a Chief Justice, even though his extension was invalid was inconsistent with the constitutional framework of the country, and the relief that we sought was not granted. But I am still working for the Legal Resources Centre. We have four officers in four different cities in South Africa, and we do, particularly cases before the
provincial divisions, and eventually the Constitutional Court, in relation to violations of fundamental human rights of individuals, but more particularly communities or classes of persons. We choose cases, which would establish a principle for other people, from acting for a female professor at the university who felt that she was discriminated against because male professors got housing allowances and she didn’t. Or a teacher at a well-established school where the principal insisted that all teachers should attend the chapel services, and a woman teacher said, well, you know, I don’t want to discuss my faith with you, but you cannot tell me when to attend the chapel and when not to. Although she did attend from time to time but she took exception to it being…and she was fired. We acted for her. Fortunately the school got good advice and offered her the job, which she didn’t want anymore. So my daily work is working with colleagues who are in full-time employment, though we are at the moment four advocates in the Legal Resources Centre. But we are also very pleased that members of the Bar actually accept briefs from us, usually without expecting to be remunerated, but sometimes if costs are awarded in favour of our clients…we don’t litigate in our own name, we always act on behalf of an NGO (non-governmental organisation) or of individuals. So, my office is open to the other three colleagues and there are about eight or nine attorneys, who come in, they flatter me by seeking my advice. I am deliberately computer illiterate, but they are very clever and I can give them, if they come, it comes back to mind that there is a judgment in the fifties, which dealt with this principle of law. I don’t remember the name of the parties but I remember the name of the judge, possibly one of the advocates, that I did it, and I give them that, within two minutes the judgment is on my desk for me and them to read, and we discuss it. I also perform the function of actually helping in the training of our article clerks who want to become attorneys, and also we are rather fortunate to get young people as clerks, who have actually been registrars of the justices of this Court. And we also get a lot of people from the various countries, the United States, the United Kingdom, Sweden, Australia, France, Holland, coming for a minimum of three months with us in order to take part in our preparation of cases.

Int George, in terms of the last case that you appeared and the outcome, what are your reflections on that particular case Justice (Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others)?

GB You know, nobody likes losing a case (laughs). But I avoid passing judgment on judgments…

Int Sure. I think my concern is more the fallout, what has been the fallout in terms of the consequences of that case Justice (Justice Alliance of South Africa v
You know, there was unfortunate fallout. I think that some of it was unnecessary. And what I think did happen is that the present Chief Justice was appointed. There was talk of challenging it. We were against it and we believe that the other NGOs (non-governmental organisations) that were approached correctly decided not to challenge it. You know, the fears expressed by some people about the new Chief Justice are not well founded. I don't want to speak about the talents or otherwise of the Chief Justice, but we must remember that this is the most important Court in the country. The Chief Justice is one of eleven. And we learnt from the experience in the United States of the divide of (Supreme) court where many decisions are five/four. We want to avoid that and I think that we have and will manage to avoid that. The Court jurisprudence is rich, and I don't think a new Chief Justice, whether he or she might have been, will want to disturb the rich jurisprudence that has already been established. I was rather pleased to hear the Chief Justice acknowledge that there is this jurisprudence and that he is there to defend it. I believe him.

George, thank you for that. In terms of some of the difficulties and challenges of adjudicating cases, from your perspective, what do you think are some of those challenges for the Court and its judges?

I've had some judicial experience. I was on the Court of Appeal of Botswana (laughs) on a part-time basis.

I remember that.

You remember that. And I've also acted in the Johannesburg High Court a couple of times. You know, the idea situation of a judge living in a vacuum is a daydream. There can be no doubt that what are your perceptions of what is right and what is wrong, what is just and unjust, will play some role in your decision making. But I think that the experience one gets in practising law, in actually sitting in the provincial divisions or the Appellate Division, gives you a sense of responsibility, that enables you to put into the background what your personal feelings are. And you apply the law to the facts to the best of your ability, in an honest manner, without fear or favour. In an ideal world you would never go wrong. But there are checks and balances in our system, which allow you, if you go wrong, to be put right. There is no substitute to the system that we have adopted, and a couple of us have recently spoken out about the criticism of the judges and their judgments, by people who exercise political power, who get upset when they lose cases; they blame the Constitution and they blame the judges for finding against them. I think that
they are wrong, and I've said so in public. So has former Chief Justice Arthur Chaskalson recently. So has former Justice O'Regan. So has Geoff Budlender. There has been no response from those that blame the Constitution and the Court. But I do believe that even those who are highly critical of the courts and the Constitution, are a small minority. Coming either from the left and the right camps. But I do believe though, that the centre is holding. The vast majority of the people in South Africa, including the political parties and other, the NGOS (non-governmental organisations), do believe that our courts are doing a good job and they will be supported and protected from any interference from any quarter.

Int  In terms of socio-economic rights, what do you think of the criticisms that have been levelled at the Court that it hasn’t done enough to satisfy socio-economic rights?

GB  Well, I think that the people who make that criticism don’t have regard to the judgments, the important judgments in relation to housing, in relation to gender, in relation to education. The courts can’t build schools, nor can they give people water and housing. There is this unfortunate misunderstanding by some politicians that policy is the business of the politicians, the executive, of parliament, and not the Court. Time and again the court said, yes, policy is your function but your policy and actions taken under your policy must comply with the provisions of the Constitution. If your policy is contrary to the provisions of the Constitution or your executive members perform acts which are not in accordance with what is expected by the Constitution, it’s the court’s business to say so and declare them invalid. You know, I always give the example in Grootboom ((Government of the Republic of South Africa and Others v Grootboom and Others) case, where eight hundred odd people were ejected from their shacks and they had to go on a football ground during the rainy weather of the Western Cape. During the hearing, the Legal Resources Centre was involved in that case, the state put in a large volume that we have a policy in relation to housing, that’s our business. You can’t tell us or make an order that they are seeking that we should provide accommodation for these eight hundred people, men, women and children out in the rain in the middle of winter. And they handed it up, this is our policy, and you can’t interfere with it. You know what the head of the Court, Arthur Chaskalson asked? Please let us see on which of these pages of this document the situation of these people is dealt with? It’s no good telling us that you have a policy to build RDP houses at so many hundreds or thousands a month. We have a problem with these eight hundred people and the complaint is that you have a constitutional responsibility to do something about them. And they say, no, no, no, that’s not your function. Well, they were not listened to. It was their function because they had no policy, or the policy to be made on an ad hoc basis wasn’t put up what the Court said. This is what you are going to do and you’re going to report to us. So putting the blame on the Constitution is again being played, I believe, by people who have not taken the trouble to read the Constitution, to read the cases in which it has been interpreted, and confine
themselves to sloganeering that it's an executive act or it's our policy and you can't interfere with it. These things have been said over and over again by the Court in decisions. It appears to me at times that those affected, and even some of their legal representatives have not properly understood what the function of the Constitution and the Court are.

Int George, in terms of judicial transformation more broadly speaking, more than just demographics, what do you think are the key issues facing South Africa?

GB There can be no doubt that our male dominated and white dominated judges, before the new order took over, was unacceptable. President (Nelson) Mandela was not unaware that there had to be fundamental change in the judiciary. He, being a lawyer himself, extended the period of office of Chief Justice (Michael McGregor) Corbett. The Court of Appeal was divided with the majority not wanting to exercise constitutional jurisdiction. Chief Justice (Michael McGregor) Corbett was not part of that majority. This came to the notice of the President, he extended his term of office in order that there should be an orderly fundamental change in the appointment of judges and their promotion. Dullah Omar was the Minister of Justice, he too was aware of it. The establishment of the Judicial Service Commission with the powers that it has and its composition, I think was a very wise provision in the Constitution. Parliamentarians, representatives of the profession, representatives of academic lawyers, four appointed by the President after consultation with all the political parties, was a good mix. And with a mandate to transform the judiciary having regard to the past and try and appoint from the disadvantaged people of the past, whether on the ground of race or gender. I did not want to take part in any political dispensation, for my own reasons. I don’t like the discipline, which is imposed on people who take part in politics. But I was requested by President (Nelson) Mandela, with whom I have been friendly to this day, to take part in that Commission as his representative. One of the four. We tried very hard, and more particularly under the guidance of Dullah Omar, who was an ex officio member of the Commission, and I think that we haven't done too badly. The majority of the judges in the country, after fifteen years, from the two that were newly appointed after 1990 and before 1994, are now over sixty percent are black. Twenty-five percent are women. It is regrettable that there are so few women but I think that this is not really a problem that the Judicial Service Commission has failed. It's because women were so badly discriminated in the past that there is not enough material from whom appointments can be made. So to say that the Constitution requires…rather that the judiciary requires transformation and that it hasn't been transformed, and that a committee must be appointed in order to adjudge the work of the judiciary, are misguided and not fact based conclusions. I believe that particularly former Chief Justice (Arthur) Chaskalson and former Justice (Kate) O'Regan, leaving aside other members of the profession and NGOs, are correct, that having regard to the circumstances we have not done too badly in relation to the transformation of the judiciary.
George, you spent fifteen years, if I'm not mistaken, on the Judicial Service Commission, I wonder whether you could talk a little bit about that experience and what made you decide to leave?

I considered it an important part of the work that I have done. In the public perception I think I got a bit of a bad reputation that I had some difficult questions to ask (laughs). Particularly of people who had played an important political role during the apartheid system. And I also would ask difficult questions of people who shortly before…months before their application to become judges, all of a sudden joined a political organisation in power, and were not quite frank as to what they had done in order to show that they were judicial material by what they had done during the apartheid years. Well, I considered it to be part of my duty and people who were rejected will say that I may have been unfair. Well, it’s their right to do that. But I do believe that my experience in the profession was very useful in assessing the men and women who came and who wanted to be appointed as judges. There were people on the Commission who would want to embarrass applicants. How many cases have you done of this nature and how many cases have you been in of that nature and the other? That didn’t count a lot for me because I knew that people of the wrong colour, in their eyes, had never had an opportunity of doing such cases. But what we were looking for is, is this person a fit and proper person and sufficiently intelligent and sufficiently learned to do a job, even though he or she may not have had the experience of a competing candidate. We would try and determine, has this person, given an opportunity, the potential to make a good judge? We made a few mistakes, which I regret. But that is inevitable. But on the whole, I think that we have a judiciary of which the vast majority of the people in the country can be proud. And we had difficulty whenever a new block of members of Parliament and appointees of the provincial council…because in their background they tended to caucus. It took us a little time to persuade them that being a member of the Judicial Service Commission, you have to forget about your political insignia. You have to apply your mind irrespective of his or her political connections. Has this person shown by her past behaviour, shown that they are judicial material? And it may be that she is not as experienced as some of the other candidates. But Ismail Mahomed when he was chairman of the Commission, wrote about half a dozen things that we had to look for. I remember the last one very well: what is the appointment of this person, or the failure to appoint this person, what is the message that will be sent out to the community? It’s a difficult concept, but we took it into consideration. I thought that fifteen years is more than enough. It’s five years more than even the President (laughs). I didn’t seek reappointment. I didn’t seek reappointment for my second and third term either. But I was told when I asked Mr (Thabo) Mbeki’s legal advisor that, hasn’t my time come to an end? I was appointed by Mr (Nelson) Mandela. And she said, well, look at your letter of appointment, it doesn’t give a period, stay where you are (laughs). And that happened for Mr (Thabo) Mbeki’s second term, just stay where you are. But I am confident that we have
a tradition, not only since 1994/1996, there has been a tradition in South Africa of exceptional judges trying to do justice under very difficult circumstances, with a hostile government not liking their judgments but nevertheless striking down the legislation that deprived the Coloured people of the vote. The charade about declaring Parliament a court in order to validate their invalid act. But during the period of apartheid, a number of judges…not a great number, but a number of judges, gave decisions to strike down delegated legislation which violated the fundamental rights. The decision to strike down the proclamation that no worker worked for more than eleven months for fifteen years, had no right to bring his family because he didn’t have ten years continuous employment. Justice (Frans Lourens Herman) Rumpff in his court, a man who didn’t deny his connections with the apartheid regime, was absolutely disgusted by the passing of that proclamation, and ruled that it was invalid, which led to a few hundred thousand women and children coming into the urban areas and it was the beginning of the end of apartheid. The two judges who said that you can’t order the ejectment of a person because he and his family unlawfully occupied a house in the wrong group area. Yes, you may contravene this section but you have a discretion, where is this person and his family going to live? That really broke apartheid in the centre of the city and in Hillbrow and Berea and Yeoville. So there were judges who actually may not have been anxious to really challenge the principles of apartheid as a whole, but they couldn’t bear the thought of personal injustice against individuals. And where they could, they found ways of actually doing it. Even that is a tradition of respect by the vast majority of the people in South Africa.

Int  George, do you think you have any fears for the future of the Constitution and the Constitutional Court?

GB  You know, I’m often asked the question, what is the future for us? My answer is a simple one, I am an optimist, but in assessing my optimism, they must remember, that I was optimistic in the forties (laughs) and fifties and sixties and seventies and eighties and nineties. I’m not going to change now.

Int  (laughs) Fair enough. In terms of transition to democracy and the role of the Constitutional Court, what were the challenges then when the Court started and what do you think are some of the challenges that remain for the Court?

GB  There were great challenges for the Court to fashion a new constitutional orientated jurisprudence. I think that that jurisprudence is a matter of record, and I think that the future is going to be within the parameters of that jurisprudence. There may have to be changes, but I am confident that whoever may be appointed as judges in the various courts, including the Constitutional Court in the future, this will be a heritage that would be very difficult not to follow. So I think that the difficulties of the past, with a brave Court…and I will call it a brave Court, or even though there were some few
stars there that outshone others. But I think that it’s very difficult to break away from that. It’s going to continue.

Int George, you’re the right person to ask this question, there’s concern that the court has taken perhaps a more very distant formalistic approach, and in that it’s created a gap between the values of the Constitution and the needs of the people, do you sense that…?

GB Well, who are the people? Who are the people who say that the courts have gone wrong? Usually the people who lose cases. Or are in a group which…whose will is not done by the courts. I am impatient with some white people who say that their rights are not being protected by the Constitutional Court. My answer to it is, that they are actually confusing privileges with rights. The Court is not there to protect privileges of the past; it is there to protect all the people, including the privileged ones of the past, by protecting their rights, not their privileges. So we’ll survive criticisms from both sides.

Int George, one final question, what do you think are some of the achievements of the Court, and some of its failings? You’ve alluded to some of the achievements…what about some of the failings?

GB Well…the praise that the Court has received from all quarters in the world is enough. It’s not for me to toyi-toyi on their behalf. But I think that a lot of thought went into the writing of our Constitution. Those who say that it was the product of a bunch of lawyers in a dark room, just don’t know what they are talking about. We went all over the country and had meetings and heard people, what sort of Constitution? What sort of electoral system? What sort of a presidential system do you want? And we took all that to consideration. There were choices to be made. I think that we have made in the main good choices. It’s not written in stone. We chose for instance to have floor crossing. That wasn’t…we actually asked researchers what was a proper democratic practice, floor crossing or not? And Kate O’Regan, who was one of our researchers at the time, and her team, very quickly came with a list of so many countries have floor-crossing and so many have that. There were about the same in number. We took the view that it appeared that democratic countries differed in that approach. We didn’t include floor crossing in the Constitution because we said that’s a political decision to be decided by politicians. They passed an Act providing and then they passed an Act setting it aside. So we were very careful to leave political questions to politicians, and there have been a number of necessary amendments, but Ismail Mahomed, one of the most articulate of our judges, actually said that this Constitution provides for majorities for amendment. However there are certain fundamental principles in the Constitution that not even unanimity can change them. If a Parliament says that we will no longer have an election (laughs) and we will appoint so and so as the ruler who can appoint a cabinet that he wants, the Constitutional Court will say that it is so far removed of what the Constitution
provides, that no Parliament can pass such legislation. I think that Ismail Mahomed was right and nobody will think of doing it.

Int George, you always pre-empt my questions, so is there something I’ve neglected to ask you which you’d like to…?

GB No, I think that you have done more than well enough, thank you very much for asking me.

Int George, thank you so much, as always, for a wonderful interview, and always for the generosity of your time and sharing your thoughts.

GB Thank you very much for asking me and I wish your project success.

Int Thanks, George.
Collection Number: AG3368

CONSTITUTIONAL COURT TRUST ORAL HISTORY PROJECT

PUBLISHER:
Publisher: Historical Papers Research Archive
Location: Johannesburg
©2014

LEGAL NOTICES:

Copyright Notice: All materials on the Historical Papers website are protected by South African copyright law and may not be reproduced, distributed, transmitted, displayed, or otherwise published in any format, without the prior written permission of the copyright owner.

Disclaimer and Terms of Use: Provided that you maintain all copyright and other notices contained therein, you may download material (one machine readable copy and one print copy per page) for your personal and/or educational non-commercial use only.

People using these records relating to the archives of Historical Papers, The Library, University of the Witwatersrand, Johannesburg, are reminded that such records sometimes contain material which is uncorroborated, inaccurate, distorted or untrue. While these digital records are true facsimiles of paper documents and the information contained herein is obtained from sources believed to be accurate and reliable, Historical Papers, University of the Witwatersrand has not independently verified their content. Consequently, the University is not responsible for any errors or omissions and excludes any and all liability for any errors in or omissions from the information on the website or any related information on third party websites accessible from this website.

This document is part of the Constitutional Court Trust Oral History Project collection held at the Historical Papers at The University of the Witwatersrand, Johannesburg, South Africa.