

Int      This is an interview with Judge Dennis Davis and it's Friday the 6<sup>th</sup> of January 2012. Dennis, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

DD      Pleasure.

Int      The last time I interviewed you was in 2008 for the Legal Resources Centre Oral History Project and we didn't manage to get a really extensive biography from you.

DD      Oh, okay.

Int      So I wondered whether we could talk about early childhood and how you think events in your life may have shaped your particularly social justice and legal trajectory?

DD      Oh, fine. I think they have, in a very profound way. Although it's funny about that, you kind of only think about that later in life, you know. You look back and think things are...because I came from an unusual background for a Jew. Jew growing up in Cape Town in the 1950s into the sixties, most of the Jews, from this time of my age, would have grown up with parents who were either professional people, doctors, lawyers or accountants, or business people. My father was a motor mechanic, and my mother was a typist / secretary for a law firm. So if it is possible to describe them, I was one of Jewish working class; it was unusual in the kind of racist and stratified society of that period. And that did have a bearing on me in all sorts of ways. My parents, for some reason, which I never quite understood, after I'd gone to Kings Road School – which I think still exists...doesn't exist I think, actually when I think about it – in Sea Point, they were going to send me to Christian Brothers College. For some reason they decided at the very last moment to send me to Herzlia, which is a Jewish school. And I think that was actually quite an interesting move on their part, but it had this particular implication, that I was well aware that I came from a far less privileged background, within the white context, I have to emphasise that, than almost anybody else at the school. And I remember once, for example, when there was one of those parent-teachers meetings and my father had come home, and obviously because he had worked in overalls all day, my mother was screaming at him to get moving because they were late, and he had said, look, unlike all the other men who are in their suits anyway, I've got to have a shower and scrub up and get all the grease off. And there was that sense. We drove a car which was a 1954 Hillman in 1968 when I was in matric. Now that's only fourteen years old, but it seemed quite old. All the Jews drove Valiants in those days. And there was a real sense

that I came from the other side of the tracks. And although my parents were...my mother's side were all Communists. They had been members of the Communist Party. My aunt had left the country in 1960 because of Sharpeville. My family were old United Party supporters until 1970 when they changed, and I was a first year student. But I do think that that real sense of coming from a less than privileged background and being aware of it, being aware of what class did, had a really profound effect on my early perspective. I think the school did too. It's a very different school today to the school it was then. The school it was then reflected the Jewish world then. The Jewish world then, was a world which was trying to grapple between the secular and the religious, and trying to marry the two; I suppose today one could call it modern orthodoxy. It's not like that today. There's far less fundamentalism. So for example, in standard seven, I had a Hebrew teacher who spent the whole year teaching us '*Cry the Beloved Country*'. Now that's 1965, and he taught it in a very political way. So for the first time as a kid, I started to get a real sense of what politics were in a very profound sense of that word, because it was taught to me, and we spent the whole year discussing that book. Which today looks like a kind of a wishy-washy liberal, now it wasn't so in 1965, not for a child of fourteen years old. And so yes, I think that background of where I came from, a school that really was trying to portray liberal values at its best, which even if it was Zionist, certainly did not produce kids who would have supported the present status quo. In fact, the principal at the time, Myer Katz, who was a revisionist, bemoaned the fact that he produced all these kids like me, who in fact were on the left, and then actually said, wryly, well, I suppose I was a good educationalist because I actually was able to...and that's true. So my history was very much of growing up in a sense of realising that there was something very wrong with the stratified society, beginning to understand that our politics were really wrought with problems. And going to university, I think, with that particular perspective.

Int I'm curious, though, because it sounds like this narrative,; personal narrative, there's a sense of difference yet of belonging, and I wonder where how you married those two?

DD That's a very good point. I think I was an out...well, I think that I was an outsider, I felt an outsider because, you could not help feel that. You know, you'd go to a kid to play, and one of my best friends, who's now a Court of Appeal judge, Peter Gross, his father was a prominent attorney at the time. They had this very large house called Mount Carmel, which looked out on the expanse of Greenpoint. And when I went there for the first time to play with him when I was in standard two, I mean, they had this magnificent house, I was sharing a bedroom with my sister in a very small little flat, you couldn't help but notice the difference. And so on the one hand you felt different, but the school obviously did make you feel that you were part of some form of community. What's weird about that is that when I look at my own relationship to Judaism today it reminds me of what John Paul Stevens, the Supreme Court Justice of the United States said when he was asked, how come he

who was appointed by Ford landed up by being the most liberal member of the court? And he said, well, I don't know, he said, I just stayed where I was. And that's what happened to me, I think. But there was that sense of belonging. But that sense of belonging itself came increasingly into tension with the reality, as the Jews refused to embrace a liberal position as an organised community, so did a lot of us kids become more and more estranged from that particular position. And we were the generation very significantly after the Slovos, the Wolpes, and the rest of the Rivonia Trial, Rusty Bernsteins. I remember when I read (Glenn) Frankel's book on '*Rivonia's Children*', thinking, what would have happened if we'd been that group? And I suspect we would have been where they were. And you may say, why? Because I think deep down within the Jewish ethos there was something which propelled a sense of social justice, which we embraced as you rejected the particularism. And so there was that tension, absolutely.

Int And then the legal choice...?

DD My mother worked in a law firm. My best friend was Peter Gross, whose father was an attorney. We spent most of our lives, in standard two, three, and four, discussing what we were going to call our law firm (*laughter*). Funny, he's a senior judge in England today. And I think there was a sense from my mother's side, you know, she worked in a law firm, I used to hear about the stories. My father loved to read Benjamin Bennett crime stories, and from an early age I thought that's what I wanted to be. Did I connect that with any sense of justice at the time? No, that came later. But it certainly had a sense in which this was, you know, involving debating, involving argument, that it seemed to be that law is...I almost never thought...I mean, I did think of doing psychiatry, which is why years later I sort of compromised and went and did criminology. But at the end of the day, that law thing came, I think, strangely enough, from my mother's background and from the fact that my closest friend had integrated me into a kind of legal community, if I could put it that way.

Int Your awareness and processes of conscientisation; at what point as a young child did you really then become aware of disparities between race groups?

DD Ah, very early on. I was...I used to...Herzlia school was up in that area in Highlands Estate, and in order to get back to Sea Point, we had to take two buses. For white people in those days, by the way, public transport was fantastic. So what would happen, I'd take a bus from the school to town, my mother worked at the top of Adderley Street in a building called the Volkshaus building, which is opposite where the...right at the top, just where that Smuts statue is. And because she worked all day, and we didn't have a domestic worker, the point was that I would go to her office to have my lunch on my way home. And I remember very early on, walking from the one bus stop towards my mother's, where a group of policemen were sort of really savagely attacking a group of black men who didn't have their passes. I remember this

distinctly. And thinking to myself, you know, when I get older I'm going to stop this happening. I couldn't have been more than eight or nine, but I have a very, very clear view that this was terribly wrong, and it was terribly upsetting, and it was something that as a big person I would like to stop. And I did make the connection quite early on between that and that iconic photograph from the Holocaust of the little boy who stands like this in front of the storm troopers, a little Jewish boy with the Star of David and thinking there are serious parallels here and I don't like that. And that was very early on in my life.

Int And in terms of intellectual development, what were some of the literature that you were privy to, what were the things that absolved you? Did you find yourself lonely in your intellectual development or was it fostered?

DD At school, no. Because we came inaudible school. In 1966 I was part of the school tour that went off to Israel. Israel was a much freer society than South Africa, you could buy any literature you liked. And we all read Brian Bunting's '*The Rise of the South African Reich*'. I still think I have it in my library without the cover on because we smuggled it in, petrified that we'd get arrested when we came through. So we were reading the Ruth First's book, all that African studies, Ronald Segal's collection of which...and the '*Rise of the South African Reich*' by Bunting. Crude as it now seems to me when I look at it twenty years later, was truly a very important...you must remember, here we are in 1966, we're in Israel, this is before the '67 war, we go to the Holocaust Museum in Israel, and those connections are obvious, you're reading about them, you're seeing them. And that whole series of books, the Govan Mbeki book, all of that, becomes a very, very serious animated literature. I then stayed in a block of flats, it was also another pre-war block of flats, and in those days if you lived in a pre-war block of flats, that meant that you were on the lower end of the middle class. The 1960s were a boom, people made lots and lots of money, and they were all moving in Sea Point, either to the Fresnaye houses or to the apartment blocks on the beachfront. And we stayed in this block. One of my closest friends then, who was our head boy, David Richardson, who became a journalist for the Jerusalem Post when it was a much more liberal newspaper, his father Paddy was a journalist, was quite to the left of my parents, and we used to have long conversations about these matters. And as a kid growing up, now reading some of that banned literature, beginning to realise there was a thing called the ANC, that there was someone called (Nelson) Mandela, now being able to read (Nelson) Mandela's famous speech, just as a school kid, you began to realise that this was really dreadful stuff that was going on. And so by the time I got to university I had only literally read that kind of, you know, the classic liberal materials. In other words you could say, viewed within the prism of (Alan) Paton and his lot, and Leo Marquard. It was as we got into the seventies that I hit what was the high point of the Marxist era. And in the early seventies one read (Martin) Legassick and one read (Harold) Wolpe, and suddenly realised that this kind of dreadful system of which one was part could be understood in

a far more, what we then thought was a nuanced way. And that started to mean for me a serious re-questioning of the liberal foundations. In 1970 as a first year student, for reasons I will never know, I landed up at David Walsh's seminar in which Neville Curtis, who was the President of NUSAS, was engaging with Steven Bantu Biko. And inaudible and all of that lot. And I was there for at least half the day. And somewhere at home one of my prized possessions is the account, a book which was published by David Welsh, which is the account of those engagements. It shattered me to learn from people like Biko, that actually black people didn't need white liberals. That, gosh, I mean, really, I didn't understand that, why not? We were very nice people. Why are they rejecting us in this way? And that sort of encounter also began to sort of make me rethink a lot of my political beliefs. So that increasingly as the years went by at university, there was this juncture between myself and, if I could call it, the dominant paradigm in which we were being taught. But I was not a great political activist. People like Geoff (Budlender), who you will interview, of course who was the SRC (Students Representative Council) and the NUSAS president, were far ahead of me, but that's because I think they were far more developed than I was. I mean (Geoff) Budlender was...well, he always has been, he was a consummate political politician, he was fantastic at the time of the St George's Cathedral stuff that had occurred here in 1972. They were ahead of where I was, but I did start getting involved in the Wages Commission in a slow way. So mine was...I mean, it took me quite a long time, I have to confess, even with all that I'm describing to you, to kind of break from what was a liberal paradigm that I'd received essentially from home and also from the school. And then of course came 1970 as well and then that was the first election as an eighteen-year-old child that I campaigned for the Progs, for Colin Eglin. I think in that sense I was similar to a whole host of people who moved to the left thereafter. It took me a bit longer, that's all.

Int And you were at UCT (University of Cape Town)?

DD I was at UCT (University of Cape Town). Which was a...in which the liberal paradigm dominated but it was also exhausted. So if you took, for example, my position as a law student, we had a law school whose heroic moments had come in the fifties to the extent that there were any heroic moments. Meaning, Donald Molteno, Ben Beinart, and Denis Cowen who were dominant members of law school, had had quite a lot to do with the legal challenges to the coloured vote cases in the 1950s, years later I came across the fact that they did write op-ed pieces in the newspapers. By the 1970s they were all old or they were tired and they had very little more to say. It was a sense of enormous frustration for students like myself, to see that the people who were shouting the odds, and rightly so, came from other law schools. In particular, John Dugard from Wits, Barend van Niekerk and Tony Mathews from Natal, all who deserve enormous credit. And I remember feeling, why do we have nobody who's in fact doing the same. There was a sense in which my law professors just sort of hid under the table, as it were, in circumstances where I

felt that there was a real role for academics to play the role of the public intellectual. It never happened.

Int I'm curious, this encounter with Steve Biko, and you say that you were a bit surprised and taken aback. How did you then sort of understand the role of NUSAS ...?

DD Well, you see...sorry...NUSAS seemed to me about as radical as you could get. I mean, you know, when I heard Neville Curtis and people like that, they were way to the left of me. Here was this kid who's come out of Herzlia (School) and thought that Alan Paton was avant-garde. I mean, suddenly, one was...these were people who were edging their way towards a more radical position. Crude as it may have been, now in retrospect, certainly way to the left of where I was. And to essentially be told, you know, that, well, you whites, you get your act together in your community, but quite frankly there's a...the real role here is for blacks to kind of throw off their chains, the kind of Frantz Fanon stuff. I hadn't heard who Frantz Fanon was, you know, at the time. That came a decade later for me. And so it was quite a shock that I thought that if I could kind of embrace the Curtis kind of situation, boy, that was about as good as it gets, that was kind of as committed as one should be. To suddenly have to be confronted with the fact that there was massive limitations to this paradigm, and to listen to someone as eloquent and as thoughtful as Biko, who was saying in a way that I could not accept was racist...you know, there's enormous temptation to say, oh, you know, you bloody racist populist, but he wasn't like that. And so therefore because it was so much more thoughtful it made one start to think. Of course, one then began to look at, you know, what Stokely Carmichael and Malcolm X and others had said within the American context because it was quite clear. (Frantz) Fanon, as I say, came somewhat later for me. I didn't realise what the connection was between him and what I was listening to until some years later, but it was a very discombobulating experience to suddenly realise that the paradigm in which one was a moderate advocate as opposed to really a central or radical advocate, phew, that was a big moment.

Int What about the ideas of difference and the themes of belonging at UCT, how did you negotiate that?

DD Well, you see, the trouble about UCT in the 1970s, it was a very bizarrely bland place in its own way, when I think upon it in retrospect. What were the big debates? The first big debate that I ever confronted, just as an ordinary student, was whether we should play rugby against Stellenbosch University? Geoff Budlender as the SRC president, survived as the SRC president in early, I think, 1972, having to negotiate that tricky...he only became an iconic figure with his brilliant handling of the Cathedral events afterwards, because he was so bloody gifted. But at the time that would have been...and so this was an unreal world. This was a world in which we did sit down and protest

about detention without trial, in which we'd get together and hear from Sir Richard Luyt, who was our principal at the time, that people should be charged properly before being incarcerated, only be told by the radical society of David Kaplan and Mike Morris – with whom I walked up the mountain this morning – who had put pamphlets on the chairs, that Sir Richard Luyt, when he was the governor of British Guiana, had in fact ordered detention without trial himself. It was a world...so, the debates were mad when you think about them. These were the debates of a white community looking inward as opposed to looking outward. Curtis was...and his people, were way to the left of where the vast majority of students were. And so in the early time of the University of Cape Town, the belonging was a belonging to a situation where you knew that the rugger-buggers, to put that term, were wrong. You knew that we should be involved more politically. We had also come from a period where the great sit-in had taken place in '69. We got there the year after, and again, we were in the low point. That high point had taken place in '69, and there was a slow movement downward thereafter. It only started hotting up in the later part of the...you know, '73, '74, '75, as oppression was ratcheted up, as more literature emanated from people like Steven Biko and the Black Consciousness movement. As the Marxist literature which had come out of Europe in the late sixties and early seventies start to hit South Africa. Wolpe and Legassick and others writing in journals such as *Economy and Society* and the *Journal of Southern African studies*, and that started changing the picture. Also as a Jew, there was a huge Jewish community on the campus. The campus was ten thousand, I suspect there might have been fifteen hundred to two thousand Jewish kids. By the way, there are probably only about five, six hundred now at UCT, with a population of double the size. Which is reflective of emigration, all sorts of things. So it was a very, very...it was an extension of Herzlia school.

Int Interesting...

DD For the first period. And then, as I said to you, all of those seeds that had been sowed from '65 when I read '*Cry the Beloved Country*', to Bunting in '66, to the Biko thing in 1970 for me, all that started. I remember becoming...I got arrested at the time of the cathedral...

Int That's '72?

DD Ja. Handing out pamphlets in Stellenbosch and being put in the police cells for the night. And that was the first time that I began to sort of think, what was going on in UCT was utterly unacceptable. And when the police came invading onto our campus, you know, actually got on to the campus, life had changed. Your whiteness was no longer an utter protection. Until then it had been, to be honest. It wasn't. And that did start me changing things. And certainly by the time I got to final year, I mean, I was making speeches, I did say things like, charge or release were completely unacceptable, which was

the standard thing. On the basis that, what were you going to charge them with? Laws that were pernicious was ridiculous. So I had moved massively by the time I had finished, by the time I was into my final year. But it had taken time for me.

Int And how did all of this development impact on your legal trajectory thereafter?

DD Ah! I finished university at the end of '75 because by that particular point I was a shit-stirrer at the university and the law school did not like me. Although I'd come second in the class. And the guy who had come first had simply studied and I was running at least two organisations. I decided I wanted to go overseas to study because a professor had put that idea into my head. What had then happened was that I didn't get a centre bursary money. So the way I kind of worked it out was I should go and find a job and make some money, and I went off to the Old Mutual as a tax...I knew nothing about tax, but they were needing tax people. Very weird. End of 1975, when I graduated. By '76, Soweto occurred. I was in Joburg, there I was working for an insurance company. I felt completely and utterly alienated. Talk about alienation. Here one was working in Johannesburg, in the heart of the business community, and the country seemed to be in revolution. And I'd come out by '75, as someone who now had some level of political awareness, and felt, what do I do now? And I thought to myself, there were only one or...really at that stage there were very few choices. A couple of years later there was the choice of the LRC, which we've spoken about previously; there were some people who went into the union movement; and the other was to go to university. And I started thinking that I had to get back to UCT and in late '76, early '77, I got a set of calls from the law school at UCT, quite surprisingly, they had their own problems of dissatisfaction, and they decided they'd better get some of their better people back, their brighter people back, and I was offered a job, oddly enough, because they needed someone to teach tax suddenly; for a year and a half I'd been doing that. And I thought, I've got to get back, that's where the action is. And so I got back in '77 and it was clear to me that now the country was now in turmoil and one was at university and this was a site of struggle and one had to start moving into trying to sort of see how one could make a contribution to the changing of the country. So that was perfect. It was a very conservative law school. But they were quite nice to me, and in 1978 they agreed, after I'd been there for about eighteen months, that they would give me a bursary. And in '79 they gave me early leave and I went off to Cambridge to do criminology because I wasn't sure I wanted to be a lawyer when I grew up. And I went to Cambridge and I hit the real Marxist period. It was the end of the Marxist period because if you sketch the intellectual history of the social sciences and the arts over in England, it really was a period from late sixties through to about 1980. But here I confronted Stuart Hall and Edward Thompson who came to lecture to us. I mean, this was a mind-blowing experience. I had a teacher called Colin Sumner, who had his own personal problems later, who wrote a book called *'Reading Ideologies'*, who was a really thoughtful Marxist. And this is where it all came together for me.

This is where finally I began to realise that Marxism had something really powerful to give me as an intellectual tool of my own condition. And that year in Cambridge was crucial intellectually, in pulling together what had occurred over fifteen years. So when I came back from Cambridge at the end of 1980, now I'd truly found myself as an outsider in my own law school. Because here was I, as a committed Marxist, in situations whereby at best I could say for the rest of them, they're wishy-washy liberals.

Int And then the choices you made in relation to law? Because you were at CALS for a long time.

DD I've never really made a choice in my entire life. I have to be honest with you. I have been compelled to do things.

Int Okay, the compulsions...

DD I'll tell you it was very funny, my entire life has been one. Barry Dean phoned me in 1976, later early '77, he was at UCT Law School, basically suggesting quite strongly I should take a job. Two days, after mulling over this, whether I should go back to Cape Town, and I had a motorcar accident, which the scars are still here, and I thought I'd better get back otherwise I'm going to kill myself. Anyway, I want to be back politically. A couple of years later my wife, which was my girlfriend at the time, sort of called me up to Joburg, and said, "look, you know, either we get married or we split up", and it seemed to me at the particular point in time that it was probably easier to marry than bloody well find another girlfriend. Thirty-three years later we're still together. So it just goes to show you. And then what happened was CALS (Centre for Applied Legal Studies) Was that, they'd had a big fallout. What was called the 'Dugard Kindergarten', these incredibly talented people of (Edwin) Cameron and (Halton) Cheadle and (Fink) Haysom and (Gilbert) Marcus and (Paul) Thompson and (Paul) Benjamin, had had a fallout with (John) Dugard. It was inevitable, he'd been there for too long anyway. And I got this call. You've got to do the job. No, no, and they persuaded me. And it...I knew that I was unhappy at UCT, I was an outsider to the law school, although my conditions had changed enormously because of a wonderful, wonderful commercial lawyer, the best academic commercial lawyer South Africa has ever produced, Michael Blackman, who'd been absolutely wonderful to me, and had changed everything for me there. I did know it was time for a change, and so I was very lucky because I was offered the job, I think at the end of '89, beginning of '90. (John) Dugard managed to hang on for a year. But it's absolutely so that when I took the job it was before de Klerk had made his speech. So I thought I was going to be taking over a centre, which was going to be doing more of the same. I got there, to be confronted with an entirely new reality. And with the most...I mean, to be honest, other than a couple of the people at the LRC (Legal Resources Centre), like Arthur (Chaskalson) and Geoff (Budlender), in my view, the most talented lawyers that the

country's produced. Because when I arrived, Fink (Haysom), Halton (Cheadle)...Gilbert (Marcus) left quite quickly...Paul Benjamin and Edwin Cameron were all there. I mean, you just couldn't wish for better. Here were people in the case of (Halton) Cheadle, he'd been banned, (Fink) Haysom had been detained, (Edwin) Cameron was an iconic figure on all sorts of levels. Paul Benjamin, totally underrated but quite brilliant labour lawyer, who'd worked in the union movement. All of these people were deeply involved, and it meant that it didn't take a brain surgeon to work out that what we had to do was to play a serious role in the reconstruction of a new South African legal order. We were helped by the fact that Fink (Haysom), who was much closer to the ANC than the rest of us, was made one of the point people for CODESA, and the next thing half of CALS (Centre for Applied Legal Studies) staff were involved...in fact, I've always said, no organisation had more people, I mean, in one particular point in time during that process, Fink (Haysom), Halton (Cheadle), myself, Edwin (Cameron), Cathy Albertyn, Firoz Cachalia, were all fully involved by those talks. So, you know, it suddenly became the great sort of laboratory for thinking. And in a way, you know, I've always believed in a strange way, things happen for a reason, not necessarily in a religious sense, there was I who had spent the sort of ten years of my life, from 1980 to 1990 at UCT, thinking about these questions, in the early eighties I ran a labour law course, the last seminar course, on which the last session from about '82 would be predicated in the following assumption: Nelson Mandela is the President of South Africa, he phones you up and says, he wants you to devise a labour law system for him. One person had to do it from a capitalist perspective, one from a social perspective, and we debated that. So we had spent, I'd spent all of this time thinking about what a new South African legal order may look like. And then all of a sudden, by utterly serendipitously, I took over the Centre at precisely the time. And when I had the fun doing all of those issues.

Int I know this may sound like a naïve question, but it seems like you thought that apartheid would end in your lifetime?

DD Well, I never thought so until very late, and I'll tell you the story, because it's quite interesting. It could have made me a lot of money if I'd decided to go this way, because it's quite a funny story. I had done a lot of...because of my tax work, I was being involved with Investec Bank for years. The founder of Investec Bank had been a good friend...one of them, co-founder...of my wife. And had always said to me, Errol Grolman, come and work for us, don't be silly. They made me some really unbelievable offers. I mean, it's a great source of complaint in my family now that I did not do it because I remember in the early eighties when they asked me, and I said, I just...I'd come back to UCT to be part of this political thing, and Ian Kantor who was the main founder said, "oh, don't be a child, man, you come and work for us for five years, you'll make enough money, you can go and do what you like thereafter". He was probably right, but anyway, be that as it may. And as the years went on during the eighties I had more and more to do with them. In

1989, quite weird, they used to have these sessions, for their clients, economic review of the country, and Brian Kantor, who was a professor of economics at UCT used to do it. Brian (Kantor) got ill suddenly the night before one of their big sessions, and they said, could I fill in for Brian? I said, sure, and I'll do a sort of socio-political analysis. No, that's fine. So two hundred and fifty people rocked up at the then President Hotel in Sea Point, and what did I talk about? It was just after the 1989, the last white election. And I said, this is what I think is going to happen. Number one, if you look at the figures it shows that the Nats lost to both the Conservative Party and what were the Progs. So that if we project through to '93, '94, they're only going to be able to rule either with the right or the party to the left of them. Secondly, the economic sanctions are beginning to bite to a large degree. Thirdly, we lost at Cuito Cuanavale. Fourthly, the Intifada, meaning the UDF (United Democratic Front), is not going to go away. My guess is, that only one of two things can happen. De Klerk is either going to have to repress far more savagery, or alternatively the ANC will be unbanned. And I ended my talk by saying, within the next year (Nelson) Mandela will be free and the ANC will be unbanned and apartheid will have ended. I got this unbelievably angry response from one of my closest friends, Andy Durbach. Who had just done the Upington Trial and was going to leave. And said to me, that I was a dreadful charlatan because I was giving hope to people where there was no hope. And I said, no, I think even though inaudible it's going to happen. And the reason why it made me famous because about five years thereafter I became a judge, they made me do this every year. And eventually I used to get fifteen hundred people at the Rotunda Hotel to listen to what I had to say, because I got it right once (*laughter*). So I did think, yes, I did think towards the late eighties, it had to go. And I'm on record as saying so. I certainly was sure by '88, '89, it was unsustainable, ja.

Int Interesting. And then in terms of your involvement in the Constitution making process, I wondered whether you could talk about that?

DD Yes, of course. I was involved because Fink (Haysom) had got us all allocated into various things. Strange enough, there were some very accidental people...let me give you an example, Hugh (Corder) got involved in a task, which was not to draft a new Bill of Rights, but was basically to draft a transitional Act. And for all sorts of reasons, they got involved and they totally reconstituted that project. Which became very important. I was in the one to redraft the Electoral Act, and the Independent Electoral Commission. We started from scratch. We were five on our little team. Frene Ginwala, which I have to say, is not an easy colleague, but there she was. Richard Rosenthal. A guy called King Ndlovu who was the IFP person but is now a judge in Natal. And there was some guy who had been one of the, you know, of the drafters of legislation for the Nats, that they'd put in. So there were five of us. And so my role throughout that entire period, was the role of conceptualising the IEC and the Electoral Act, which were both hellishly difficult problems. And for about a year I was a walking expert in every electoral act in the world. And so

we sat there, one side, the next office was Arthur's (Chaskalson's) and they were drafting the constitutional provisions. And frankly it didn't really matter which side you were on, you were there, eventually we came every day, and then in the last couple of months, till three, four, five, six o'clock in the morning. So I was there throughout that period. As I say, my main responsibility was those two pieces of legislation. But obviously there were broader conversations going on which were all a part. I mean, for example, I know that I was drawn into a couple of conversations about Bills of Rights issues, because Halton (Cheadle) and I landed up at Shell House with (Nelson) Mandela and (Cyril) Ramaphosa. Because we had taken a view that, I think, Albie (Sachs) and Arthur (Chaskalson)...well, Albie (Sachs) had taken a totally different view, Arthur (Chaskalson) hadn't. Albie (Sachs) actually had a far more peripheral view...role in this thing, despite all. Arthur (Chaskalson) was central. But my major task was in the electoral material.

Int And this meeting with Cyril Ramaphosa and (Nelson) Mandela, could you talk about that? What period was that?

DD Yes. It was certainly the early nineties. It would have been right through the CODESA period. I think it had to do...it may have had to do with things like crossing the floor stuff and the electoral stuff, if I recall correctly. I can't honestly tell you precisely what the issue was. I do remember this, very clearly, that I realised then (Nelson) Mandela was never a detailed man. Because he came in, shook hands with all of us, it was, hello, hello, hello, and it was all that wonderful Mandela charisma, sort of said, look, this is an issue which I've asked you all to come to, and then promptly left and let Cyril (Ramaphosa) do all of the intricate...which he did magnificently. And it was clear to me at the time, that of all of the advisors, you know, that the one he really kind of trusted, was Arthur (Chaskalson). He took what Halton (Cheadle) and I had to say very seriously, because he had known us from a decade earlier. And he wasn't a hundred percent well disposed towards Albie (Sachs). He was actually quite peripheral. Ironically. Which surprised me. Because I thought he wouldn't be.

Int You mean...?

DD Ja, I thought Albie (Sachs) would be more central. Although it always surprised me that Albie (Sachs) was not part of any of the CODESA teams and although he'd been part of the ANC constitutional thing and they floated around, and then clearly stuff was brought back to them, it was obvious to me then that Arthur (Chaskalson) was absolutely crucial to the broader enterprise of the constitutional development. As was, I think in some ways, (Joe) Slovo. Who was incredibly clever, Unbelievably sharp and a formidable debater. That's what my sense of who he was. They were having those meetings because...because when you got to...if things went swimmingly it just went along and frankly Cyril (Ramaphosa) and the ANC people from inaudible

would just sort of press the green button and off you'd go. It was when there were difficulties within the groups that it came back to that board of plenary.

Int Okay. And then in terms of the need for a Constitutional Court?

DD I think that was always on. You must remember that during that particular period in time, all sorts of discussions were taking place. The country was really a seminar. And I remember distinctly, you know, we were running these very, very good, two, two and a half days sessions, which (John) Dugard had started, to his great credit in the 1980s, which were to promote dialogue between then between the judges and human rights advocates. We had continued it in this new format to kind of explore how do we reconstitute the legal terrain. And those conferences when we got them in the 1990s were conferences of a vastly different proportion, or should I say composition, to the ones that (John) Dugard had. Because firstly, we were determined to make them far more demographically congruent with South Africa. So many more women, many more black lawyers, and obviously a lot of the ANC people who were brought into the business. And I remember distinctly, obviously the issue of a ConCourt being discussed there. And there was never any opposition to the idea, that you could not possibly have simply lifted that Constitution unaided into legality and legitimacy by virtue of the Supreme Court of Appeal, being the Appellate Division, as it then was, being the final arbiter of that. Everybody knew that wasn't on. So the idea of a Constitutional Court was one which everybody, even the Nats who had had their own ideas about a new Constitution were not going to be ill-disposed towards, for the simple reason that it was known. They wanted a specialist Court. We wanted a Court that could actually be one which we'd be truly proud of and which wouldn't have the baggage of the past. So I never thought that that was a big dispute. The real dispute was clearly the composition, who was going to elect, and how many, and then for what term. Those were the disputes.

Int In terms of that initial period, '94, when people were being elected, the sitting judges that were nominated and the JSC (Judicial Service Commission) interviews, what are your memories of that?

DD Oh, I have a lot of memories of that.

Int Tell me...

DD My first memory of that was that I had seriously argued in favour of the interviews being televised. And if the interviews weren't televised I definitely had wanted them to be on radio. Arthur (Chaskalson) was implacably opposed to both. In fact, we had huge, huge arguments. There's always been tension between Arthur (Chaskalson) and myself. I said, years later, about a year ago, when Arthur (Chaskalson) and myself, we were now very friendly

and we've basically found ourselves on the same side defending Richard Goldstone, one night at dinner, with Arthur (Chaskalson) and Gilbert (Marcus) and Edwin (Cameron), we were talking about this, I still said jokingly to Edwin (Cameron), "I hate Richard Goldstone", and the answer came back, why? And I said, "well, if he'd only started this nonsense six years ago, given Arthur and my relationship, as a result of this, I would now have been on the Constitutional Court". And even Arthur (Chaskalson) laughed. But Arthur (Chaskalson) was implacably opposed to that. I mean, he sort of said to me, well, it's all very well for you, because you do television, I wasn't going to apply. Anyway, and that was the first thing. I thought, it although was very, very wrong for those interviews not to be made public. I also know that the interviews manifestly as they have continuously done, did not play as significant a role as they should have. Had they done so, (Albie) Sachs could not possibly have been on the Court. The interview is well documented, everybody knows, I mean, his performance was nothing short of appalling at the time, that, let me make the qualification, should not be construed as suggesting that if we look onward that he didn't play a significant role. And in fact, you know, Etienne Mureinik who was my dear friend on the Commission, was really opposed to Albie (Sachs), I've often thought, that he'd roll over in his grave if he heard me saying that I think that Albie (Sachs) has made a very, very constructive contribution to the jurisprudence of the Court. Not in every case but in some cases. But he certainly, you know, that interview would have been compellingly against. And I think that if someone had seen the interview of June Sinclair, that probably would have had her on the Court. So the interviews were...as I say, I don't think that was public. I remember having very violent arguments with George Bizos and Mick Corbett about that. Albie's (Sachs) was the most dramatic by a long shot. But there were some interesting ones as well. I remember the one with John Didcott. John Didcott had never ever sentenced anybody to death as a judge during apartheid. He was asked by David Gordon, well, you took an oath, an oath to fulfil and implement the law. Yes. Well, then how do you reconcile that with the fact that you never sentenced anybody...? His answer was brilliant, he said...and if anybody knew (John) Didcott, knew how funny it was, he said, well, we always sat with two assessors, and although extenuating circumstances were probably more mine than them, they never ever disagreed with me. Well no one was ever going to disagree with (John) Didcott in that situation. But...so the interviews were quite dramatic in that sense. I thought that some of the...you know, (John) Dugard, probably unjustly treated in that again. I mean, he was impressive, was perfectly clear that he was going to be our most important international lawyer, and he should have been there. So those interviews were...they were really interesting and they've probably been the best interviews that the Judicial Service Commission ever conducted. I'm not sure they took them as seriously as they should have. But they certainly I think are the best that they've ever conducted. Because I think that was the best Judicial Service Commission we've ever had.

Int What do you think of the choice of Richard Goldstone, as opposed to John Dugard?

DD I thought it was unfortunate. And I'll give you three reasons why. You're quite right, you've put your finger on it. It was perfectly clear to us that there were going to be four judges who were going to be white ...because remember that was the compromise. I'll come back to the President in a moment, because that itself is an interesting story. But once Arthur (Chaskalson) was there, then clearly Ismail (Mahomed) had to be one of the four. And they clearly wanted another black judge, and that was (Tholie) Madala. Fair enough. I know he was criticised by others, who will remain nameless, I remember once being blamed for that but I had nothing to do with that unfair criticism of (Tholie) Madala. I was perfectly happy with his appointment. And then there were two others. They wanted an Afrikaner, and that's how (Laurie) Ackermann got there. Couldn't quite understand why (Johann) Kriegler hadn't got there and (Laurie) Ackermann had, I think it was wrong, but that's another matter. And then there was (Richard) Goldstone. It was obvious to me at the time that it should have been (John) Didcott. Nobody who was going to take a fair view would have thought that in terms of sheer principle, the herculean judge under the apartheid era had been John Didcott, and it was disgraceful that he hadn't been appointed. That therefore meant that when they had to appoint the six, (John) Didcott had to take his chances there. Then also meant that when you looked at the six, two women had to be appointed minimum, we've never moved out of identity politics in that sense. Should have had three because it should have been Sinclair, as well, but I'm not going to go into that now. So it was of course (Kate) O'Regan, who was a great surprise appointment, and turned out to be a wonderful acquisition, and (Yvonne) Mokgoro, who did a good job. Now you had four left. Well, you had to have a couple of black people, so (Pius) Langa of course, was a silk, and was clearly the senior black judge and deserved to be on the Court on any basis, on all bases. So he was there. So now there are three places left. Well, you know, what are you now going to do with the three places? You've got a string of judges there, (John) Didcott and (Johann) Kriegler, both of whom should have been on the first thing, cut. You've got Albie (Sachs) and you've got (John) Dugard. As Etienne (Mureinik) said, they wanted their white hero of the struggle. And Arthur (Chaskalson) clearly played a massive role within the Judicial Service Commission's own deliberations, to swing people around, notwithstanding his interview. And (John) Didcott had to be there. And (Johann) Kriegler was another Afrikaner and he had to be there. So (John) Dugard is the fall guy. So if you looked at it...if (Richard) Goldstone had been said at the time, look, I can't take this because I'm a prosecutor, and I'll take my chances the second time around, because he would have been young enough, right? Then (John) Didcott would have taken that slot and (John) Dugard would have got on. And that's what should have happened.

Int Why did you think that Mr (Nelson) Mandela didn't push for this?

DD I don't know. I really don't know that. It's a very good question. (John) Dugard had been unbelievably good to his kids. (John) Dugard was our pre-eminent international lawyer. (Nelson) Mandela was strange about that. It's probably similar to the story that I was told, as why he didn't put (Cyril) Ramaphosa there, which was that he was quite reluctant to impose his own choices. I can only assume that he must have taken counsel. And I would have thought that the counsel he would have taken by then would have been Arthur (Chaskalson) because he was the President, when it got to the seven. When it got to the four, and of course, (John) Dugard wasn't a judge...so why he decided on (Richard) Goldstone, as opposed to (John) Didcott can only be described to the fact that at that particular point in time, (Richard) Goldstone was arguably a better promoter of his own cause than (John) Didcott would have been. When it got to the seven they were in trouble...the six, they were in trouble. Because if they're going to put (John) Dugard on they would have had to drop off one of (Albie) Sachs, (Johann) Kriegler or (John) Didcott, and that would have been tricky. And I don't think they thought it through properly. You see, I don't think...what I'm interested in knowing, and I don't know, but I speculate, that Arthur (Chaskalson) must have been consulted once he was appointed about the four. Now how far he was prepared to push his own choice...look, there's no doubt, I know Arthur (Chaskalson) got the Court he wanted. I'm not prepared to disclose how I know that, but I do know that. The only reason is because the person who told me I think would feel rather uncomfortable if I disclose the name. But I know from absolutely sure that that was the Court he wanted. And I don't understand therefore, why he was so keen on (Richard) Goldstone. I can only speculate to the following, that somewhere along the line, (Richard) Goldstone was probably the most experienced commercial judge, and maybe Arthur (Chaskalson) thought that there were going to be cases that had a commercial implication, he felt that he had to have him there. But other than that, I don't know. I find...but, I will tell you an anecdote. When Arthur was appointed as the President of the Court, John Dugard came into my office that morning, and he said to me, "Dennis, your last chance of getting onto the Constitutional Court has just gone". I said, "What on earth are you talking about?" He said, "They've appointed Arthur, not Ismail, as the President of the Court". And I said to him, "Well, John, let me tell you the following. I wasn't going to apply, but you are, and your last chance of getting onto the Court has just gone out of the window". And he said, "You're probably right". And so there was a view that there was a tension between Arthur (Chaskalson) and John (Dugard), and that may have accounted for it as well. I honestly don't know. But I've often thought it had to be. Because Arthur (Chaskalson) is too clever not to have worked this out, and if he'd worked it out and said to (Nelson) Mandela, I really want (John) Didcott there, (Richard) Goldstone would have either had to take his chances, and had he taken his chances he would have then been subject to questions about what was a very patchy record. It had a couple of good things like *Govender (S v Govender)*, but had some very seriously terrible ones, such as *Momoniati (Momoniati v Minister of Law and Order)*, where he upheld the detention of detainees in circumstances where Gerald Friedman from this

Bench dissented, and which I've documented in a book that I co-wrote with Michelle Le Roux called '*Precedent and Possibility*' ('*Precedent and Possibility: The Abuse of Law in South Africa*') on precisely that. So I have to say that's the only thing. The thing I've learnt over time is that Chief Justices have a much larger role in these appointments than...I have no doubt that when I went in 2009 that the previous Chief Justice got the people he wanted.

Int How influential was Dullah Omar in all of this?

DD Oh, he wasn't un-influential. He wasn't un-influential and he may well have...but Dullah Omar would have had some influence. George Bizos, I think, had more. And I'll tell you why I say that. There was huge speculation as to who was going to be the President of the Constitutional Court. It could have only been one of two people. So we had this interesting choice. You had, other than Sydney Kentridge, probably the finest advocate the country had produced in many a long year, being Arthur (Chaskalson). But on the other hand, you also had a pretty outstanding advocate, Ismail (Mahomed). Probably on balance Ismail (Mahomed) took more cases than Arthur (Chaskalson) did, and he was black. He had been subjected to a sustained history of discrimination against him. He really had. Hadn't gone to Dale College like Arthur (Mahomed) had and had the privileges. The question was, it was obvious it seemed to me, even though I had huge admiration for both men, I always used to think that when I grew up I'd like to be like Arthur (Chaskalson), because he was, to me, the quintessential advocate, quite brilliant. But Ismail (Mahomed) was, you know, symbolically, and from a point of view of merit, an enormously compelling candidate. At a cocktail party...at a Christmas party that took place, CALS' (Centre for Applied Legal Studies) Christmas party, we were all speculating about this. There were a couple of people at the party, who again shall remain nameless, who had huge insight and influence, and they told us in turns, that it was going to be Ismail (Mahomed). And I was led to believe that that's what the cabinet decision was. My understanding was that George Bizos had a huge role in turning (Nelson) Mandela around to support the candidature of Arthur (Chaskalson), which is what happened. Again, in parentheses, it was probably the right decision, for this reason. Symbolically the wrong decision. And the wrong decision in terms of the Judicial Service Commission going forward, because I have no doubt that Ismail (Mahomed) would have confronted far more aggressively on a non-racial basis than Arthur (Chaskalson) ever felt himself able to do. Arthur (Chaskalson) found it very difficult for reasons, which I've never quite understood, to actually confront black judges when they were going wrong. Big problem. But, Ismail (Mahomed) was not an organisational man. Arthur (Chaskalson) constructed and developed the Court in a way that that Ismail (Mahomed) couldn't. And so, on merit I'm prepared to say, my initial view notwithstanding, the right decision was made. But it had a hell of an effect, on Ismail (Mahomed), and I do think that Dullah (Omar) would have probably preferred Ismail (Mahomed). Despite all.

Int There was a sense that Ismail Mahomed was extremely disappointed...

DD He was shattered, not disappointed. I will tell you. He had had a triple bypass and he had just recovered. He was still in hospital when the announcement was made. Whether it was because of the drugs or whether it was because of just the sheer disappointment, when he phoned me he was crying. We had five conversations of him having broken down. I mean, I found it unbelievably emotionally draining. And I often said that my relationship with Ismail (Mahomed) was one of father and child, but I was never quite sure who the child was, and who the father was from time to time. He was absolutely shattered. It was a terrible, terrible set of conversations I had with him in which he had felt that having defied all the apartheid odds in such an unbelievable way, that not to give him this accolade, no, this government, it was just unbelievably treacherous and cruel. He felt...I'm not sure he ever quite recovered from that. I know that he didn't want to become the Chief Justice, he didn't want to go to Bloemfontein, he hated it. I know he required huge persuasion from a couple of us to go there. I know that every Sunday morning, he and I used to have a conversation; he phoned me every Sunday from Bloemfontein throughout his time there, and he moaned and groaned, hated it. Apparently the residence, it's called the White House; how he hated all of that, he didn't want to be there, and he was very grumpy about being there, he wanted to be in the Constitutional Court, he wanted to lead the Constitutional Court, he felt that's where he should have been, he felt that he'd been wrongly, unjustified...he always felt that...and this goes back perhaps to my earlier conversation with you with regard to (Steve Bantu) Biko and (Neville) Curtis...he always felt, whatever the merits of that argument were, that the white establishment gave Sydney (Kentrige) and Arthur (Chaskalson) far more credit than they ever gave him.

Int What do you think?

DD I think he deserved more credit than he got. And whilst I say to you that, you know, I think on an organisational basis, they made the right decision, I have to say that there's something deeply ironic about a country that had an opportunity to appoint a black person as the first President of the Court and didn't do so. Now, Ismail (Mahomed) would have been impossible, he was impossible, but he was also an extraordinary human being, and you know, maybe he wouldn't have done so well on the organisational front but he would have done a hell of a lot better on the front of ensuring that we didn't get into the mess we've got into subsequently with regard to some very high profile cases with regard to the judiciary. I can't entirely be objective about this case, I have to be honest. So I must say, I know that probably if I was the President and I listened to all of this, I probably would have made the same decision as (Nelson) Mandela did. But, you know, I know the pain Ismail (Mahomed) went through, and I know that when he used to tell me that he was deeply scarred because of apartheid, that was also very, very true, although I used to say to

him, from time to time, that I did think that sometimes his behaviour was outrageous and nothing could excuse it, even the hurts that he had soldiered over time. It's a very sad thing, and I wondered whether had his health not collapsed and he died, whether the just thing could have happened, that he would have taken over from Arthur (Chaskalson), because he could have, because he could have stayed on. I just don't know. But it was very, very sad, and he took it incredibly badly and he was entitled to take it very badly.

Int In terms of the collegiality of the Court, much has been made about that first Bench coming from such diverse backgrounds, and Sydney Kentridge has spoken about this, and yet there was a sense of collegiality. As an observer of the Court, what are your impressions of that first Bench?

DD Well, there was collegiality, I suspect there was, you know, what can I do other than take what they say. Although, you know, when you start probing a little deeper, there were clearly tensions...

Int Okay, what were some of the tensions?

DD Well, it was quite obvious, from the very first case, that both Ismail (Mahomed) and (John) Didcott did not think that (Albie) Sachs should have been on that Court. And I say that because of the way, on the very first morning, when George Bizos was asked questions – and I was one of the counsel, so I can testify to this, it's all documented – (Albie) Sachs asked his first question and Ismail Mahomed and (John) Didcott said to (George) Bizos, "don't answer that, it's rubbish". It was perfectly obvious they were contemptuous of him. They didn't think he should be there. So, you know, the idea that they were all a happy family is rubbish, clearly they weren't. I know that shortly before his death, (John) Didcott moaned and groaned to me about (Laurie) Ackermann, who he thought was pedantic and pedestrian and didn't think that much of him. I'm not sure that he didn't want him on the Court, but he certainly wasn't a hundred percent happy with him. So I don't think...I think they were collegial in the sense that they worked together, that they sat there, I think that's Arthur's (Chaskalson) great credit, but the truth was that they were also impossible to start with. Debate was extremely difficult. They all would go off on their own way and it was quite hard as a counsel to...you only have to look also at the first series of judgments where there were far too many and you weren't quite sure what the ratio of the case was. There are cases there where for judges in the High Court, the ratio of the case is extremely difficult to divide. But they did come from different backgrounds. And they did produce a number of damn good judgments over the period of their time. I think they were far too cautious and I think we're paying the price now.

Int Interesting. How?

DD Because I think in some areas, you know...they never developed...let me give you a couple of examples. In a case called *Carmichele (Carmichele v Minister of Safety and Security)* they talk about a normative framework. But there was never one that they developed. And part of the reason for that seemed to be was because, as clever as many of them were, there was no serious legal philosopher on that Court. You know, there was nobody who really you could say was a serious constitutional theorist. So when they got into these things like the German normative framework, (Laurie) Ackermann and (Richard) Goldstone, I just don't think they were up to doing that. I really don't. And so they never developed that. And that mean that our entire common law, delict and contract, sort of just meandered almost into a case of business, as usual. And the ground rules were never altered, as they should have been, because they'd never followed through on what their initial instincts were which were correct. So that's one. I think they were incredibly cautious with regard to socio-economic rights. To the extent that they've allowed a jurisprudence of increased deference to take place as the years have gone by.

Int Deference to government?

DD Deference to government. And it's there, it's there. So you have a dichotomy. When it came to things that were directly related to apartheid, at the most extreme the eviction cases of property, they were very good. Because they didn't want to see themselves as perpetuating that. Identity politics, exceptionally good. Gay rights stuff, very good. But when you look, for example, at distributional questions, and at some kind of coherent philosophy in relation to those issues, they were not very good. And I don't think they were very good on the private law stuff. I don't think they were up to transforming our legal system as it was mandated by the Constitution. And I don't think that, to be honest...I mean, it's very interesting to me that people like Geoff (Budlender) didn't get onto the Court, and it's steeply ironic because Arthur (Chaskalson) was sort of Geoff's (Budlender) mentor, and yet I think the climate which was created early on, did not kind of treasure the judges who could have done that really well, or the lawyers that could have. And so the conditions were created where the paradigm was, you know, either you were going to transform the system by virtue of demography, or alternatively if the judge had some sort of technical experience, you know, of the old stuff, that was fine. And I think we've got ourselves into position now with a Supreme Court of Appeal that really is just not up to that task at all. With almost no judges there who could do that. In fact, it's a Court of unfortunate weakness, and a Constitutional Court that is dependent on a few people.

Int You don't think that Judge Mohamed Navsa is...?

DD I'm not going to comment about individual judges that are still alive. I will stay where we are...I will stay where I am, because you may come to the right result. The question is, can you carve out a jurisprudential basis for your

judgment that can lead recalcitrant judges into the Promised Land? Can you develop...have you got the intellectual wherewithal to actually carve out those kinds of judgments? And you only have to look to see what's going on right across the board to realise that's not so. And I do think that history will look at this quite reflectively. Of course, the contrary argument is, well, given what you've got now, aren't you grateful for what you had then? Well, the answer is, yes, but that's hardly the reason for complimenting to the extent that one should.

Int It's interesting, Dennis, because there was some concern from judges in the other courts that the selection of the judges for the Constitutional Court, the first Bench, all had a particular ideological philosophy, that they were a politically canny bunch, what did you think?

DD Ja, well, you see, the reason for that was quite obvious, because at the time in 1994, I mean, let's be honest, we had a South African Bench, where notwithstanding my points about (Richard) Goldstone, the truth is, (Laurie) Ackermann, (Richard) Goldstone, (Johann) Kriegler, (John) Didcott, were, on anybody's barometer, on the left. You may say, my god, that shows how skewed we were. Precisely. So the other judges would have said, if those are the judges we've got...of course we also take Ismail Mahomed who's already a judge, take him into account. Tholie Madala, take those judges. Well, we're not getting any of the other judges. And of course, how do we always describe other judges in our perception, we mean the 'real' judges, because anybody who's got a modicum of human rights commitment in those days, wasn't a 'real' judge. You see, because the way you rationalise 'real' judges is who could do the nitty-gritty. Well, of course that was true. But then on the other hand once you had a Constitution you were going to hope that people were going to embrace the idea that everybody should have certain equal rights, which was hardly what many, many judges felt. I mean, the Bench was replete with racism and sexism at the time. So the pool was small. Were those judges, if you took them all, were they all ideologically similar? Certainly they weren't. I mean, Ismail Mahomed had different ideological commitments. I mean, he was potentially to the left of the others. (John) Didcott was very much a kind of liberal...of a more libertarian kind. Laurie Ackermann clearly looked towards Germany with its social market interventions in a particular way. And you could go on and say, these were judges, yes, who shared some commonality, but I don't think they were all from the same ideological mould, no.

Int Sure. I think the concern was that they were all progressive as such...

DD They were progressive in the sense that you would have regarded the Progressive Party as progressive in that particular period. But if you go back to return to where I came from, they were certainly not all progressive in relation to, say, what Steve Biko would have assessed as being progressive,

not at all. And I...you see, I keep on thinking, you had a balance...I know the contrary argument will be, you start out and you've got to be very careful because you've got to develop an institutional legitimacy. And if you go out too far then your chances are less of achieving that goal. But I can't help feeling that we had a real window of opportunity in those first five years for developing...again going with my normative framework idea...a broader framework for a transformative jurisprudence, which would have been hard to have resist in those early (Nelson) Mandela years.

Int I'm also trying to understand your concerns about the politicisation of justiciable rights, and I wondered whether you could talk a bit about this?

DD Well, it's not...what I'm worried about, what I've been writing about, what I'm anxious about, is we have a failure of politics in this country...

Int Transitional politics?

DD No, just generally. I mean, people don't...sorry, there's been a weakening of the NGO/civil society sector, not what it used to be. You've got a situation of a government that can certainly confidently say whatever happens, we're getting it in 2040. We've got the beginnings perhaps of a deracialisation of that party politics. But it's slow. And so people feel...poor people, black people, feel that when they've got to go to vindicate interests or rights, there's only one forum that will listen to them. That's the courts. Now increasingly as this has occurred, you know, you have to ask yourself, what's going on here? Governments are not stupid about this, so they generally tend to want to then promote people who in a sense are going to see things through their world. Not unique to South Africa, we know that the most important single decision an American president takes is the selection of the Supreme Court justices. But that creates difficulties when you've got so young a constitutional jurisprudence and one which is still as undeveloped as ours is. Secondly, it puts pressure on those judges who in a sense see things in a more transformative way, to work out how much legitimacy capital can we expend on this or that decision. And thirdly, when it comes to the things like social and economic rights, the real issue is how far can we go to hold government accountable to their distributional choices. And that's institutionally always tricky. It requires a great deal of imagination, it requires a great deal of very good lawyering which comes before us. And all of those things are...now, that latter part is going to happen continuously if you don't get delivery, putting the courts into more difficulty both because of legitimacy and because of institutional competence. And those are anxieties that I have, yes.

Int I'm also curious in terms of, there's been concern, particularly from judges in the other courts that judgments, such as the *TAC* judgment (*Minister of Health and Other v Treatment Action Campaign and Others*), the *Grootboom*

*(Government of the Republic of South Africa and Others v Grootboom and Others)* judgment, really transgressed that line between the Executive...?

DD Well, you see, that's very interesting. They don't but the reason why the common conception is that they do is because we never ever had a serious educative moment to make people understand that if we have a very, very sophisticated, nuanced and extensive Constitution, which imposes those obligations upon Courts. So when people say we transgressed the line, what do they want judges to do to ignore that which is in the text? It's a curious clash between their inherent literalism, on the one hand, and the judicial conservatism on the other. And the judicial conservatism wins. And the answer is, because black or white, we are not getting, I think, the kind of leadership from up on high, that we should have, nor the judicial education that we should, nor the appointment of judges that we should have had.

Int You're talking about subsequent to the first Bench?

DD Well...

Int Or even referring to the first Bench?

DD As I say, I would have certainly had a couple of differences if I'd had my thing on the first Bench, but that's water under the bridge and I can't repeat that. Subsequent to that, of course, of course, both on that Bench and on other Benches. You know. I sit on a Bench, which has been denuded of unbelievable talent because of decisions that I can't even begin to understand let alone explain.

Int You don't think it has something to do with transformation in terms of just demographics?

DD Well, if it had only to do with demographics alone, then I can't explain some white appointments. Right? I mean, I'm in favour of demographic change, let me be perfectly clear. Perfectly obvious to me. And if you look at the one court for which I hold responsibility, the Competition Appeal Court, I like to say it's the most demographically changed court in the country, certainly both in terms of race and gender. No court is like that. So I'm certainly committed to that. And by the way, means, that you can find people who in fact can meet your demographic demands and your competency demands at the same time is a damn insult to people to suggest you can't. But, when you do happen to appoint whites, and white men, to use the dreaded word, then the question is, why are you appointing those who manifestly are the best, on all of those grounds? So going back to the (Geoff) Budlender example, I've yet to hear anybody who would tell me that on any of those particular sets of tests he

shouldn't have been here, let alone at the Constitutional Court. And the answer is, we can't possibly, because he was the most talented of the whole bloody bunch. And the question is, why doesn't he get there? Well, I don't...there are all sorts of theories, but I don't...I can't explain it. It's not possible. And it can't be explained by demography, because they have on this Bench alone, appointed white judges subsequent to Geoff (Budlender), who really can't hold a candle to him, as can neither anybody else who's been appointed subsequent, or to be perfectly frank, before either.

Int What do you think of Theunis Roux' ideas of pragmatism and principle and the Chaskalson Court?

DD You mean, to the extent that I can understand the argument, the fact that courts ultimately must decide matters more on pragmatic kind of how do you...and more of a kind of judicial minimalism than maxim-ism. Well, the answer to that is, that I'm always amused by that argument because it seems to me that you're pragmatic when you want to be. But you see, I don't have a problem about being pragmatic, but the question in a sense that there are cases that judges will know that they can't go further and they shouldn't. They do that for all sorts of reasons. They do that because cases aren't argued in front of them properly in relation to more expansive issues. They do that because the evidence is not available to them to go any further. They do that because it's not strictly not necessary for their decision. All of that is fine. But, we operate with the environment that we've got. We had two massive obstacles. The first was, a spuriously racist and sexist legal system. And two, a Constitution that enjoined us to change that. And so you've got...but, it doesn't mean the two are incompatible, but it does because, inaudible place for that. But it does seem to me that if that's the justification for eschewing normative frameworks, for not developing a serious view of separation of powers and the balance of courts, and not educating the balance of the courts as to where they should be going, that's wrong, completely wrong.

Int I'm also curious about, in terms of the politics of the country being relevant or irrelevant to decision making within the Constitutional Court, or the courts for that matter, Ziyad Motala's criticism of the Simelane judgment (*Democratic Alliance v The President of South Africa and Others* –Supreme Court of Appeal judgment) as 'politics masquerading as law,' what do you think of that?

DD Well, I wouldn't have written the judgment the way it was written.

Int You thought it was too strongly worded?

DD Yes, it was a kind of a cut and paste job kind of that I wouldn't have done. I think the judgment could have been written more narrowly. And by the way,

getting the same conclusion. I think the answer is that the judgment...I think that there were obligations imposed upon the President to consider certain things. If the President's papers don't indicate that, then that's it. And one could have written it narrowly. Once one writes it narrowly the question is, what Motala said, well, that's politics masquerading as law. The answer is, well, our Constitution renders everything subject to legality. And by the way, the idea of politics masquerading as law is such a complicated issue anyway, because you've got to argue, you know, isn't all political and economics themselves predicated upon some kind of legal framework? But of course Motala and those people are not American legal realists so they don't understand that in fact, if you read inaudible, one would understand precisely that there is no divorce in that clear way. And the second thing is, that once you've made that...once you've written a Constitution that says that all power is subject to the Constitution, what do you want the Court to do? Where I think there's some justification, is that the judgment over-eggs the pudding and in fact makes a whole range of remarks, in which I don't think judges have to always be social commentators. I think there's a place for it, but I think that in sensitive cases, you would write that more minimalistically in order to get to the same result. And if that's what he means then he may be right, but beyond that, no, he's wrong.

Int What about the social conditions of this country, and how much of that is taken into account in Constitutional Court judgments? What's your sense of this?

DD Ah! That's an interesting question. I think the answer to that is it depends on what we're talking about. So, if you look at evictions and the property cases, I think both the history of the country, and the social conditions which gave rise to those conditions...the social conditions that we're talking about...very important. Judges simply don't want to allow people to be homeless, be evicted, particularly when class and race overlay each other. I think these are very important factors that sway with judges. Or many judges. I think in a whole range of other areas judges don't see that political world so clearly then they get themselves more into the technicalities. I'm struck particularly by the Supreme Court of Appeal, which seems to me, all too often to exhibit an extraordinary amnesia about those social conditions. I've looked at judgments, not just those that have been overturned, but others and I thought, what world are you living in? And since we all know invariably there's more than one just right answer, what are they doing? But at the High Court level, and to some extent the Constitutional Court level, where the social reality is sufficiently clear to the judicial mindset, it's playing around. And so the art of the advocate is to get there. Now of course, one of the problems is, that's the limitations of the Bar, because many of them reflect the same mindsets as conservative judges do and are unable to, in a sense, bring the judge into a different kind of...

Int Dennis, I know that this is a conversation to be continued, but I'll ask you perhaps the last question for now, what do you think are the greatest failings of the Court thus far, Constitutional Court, and what are some of its achievements?

DD Well, the achievements, I think, clearly are that in many instances it's made the Constitution work against excesses of government power. And I think some of those judgments are extraordinarily courageous, *Glenister (Glenister v President of the Republic of South Africa and Others)* of the more recent type. Earlier ones where the ANC government was held to book in relation to provincial legislation. I have little doubt that's true. I think where the Court has worked best when it's essentially said to the Supreme Court of Appeal, which has had a very poor record before, that there is a Constitution out there that you need to apply. I think that's been very, very important. I think Arthur (Chaskalson) and his Court, at least to some considerable extent, not entirely, were able to persuade the legal profession, legal community, this was a Court worth paying attention to, and that was important. I think its failings have been its lack of being able to develop a conceptual framework. It's failed to educate the public...sorry, legal community, fully. I think in a number of cases it hasn't thought through what the implications would be for judges at the High Court level to follow. With vague and overwritten judgments of the kind that really aren't desirable. I do think it's got our socio-economic rights jurisprudence into a mess. I think you only have to look at countries like Colombia on the one hand or Germany on the other to realise that there was another alternative which was open to it. And those failings then therefore means that I'm not sure that there's sufficiently strong enough foundations that should have been laid to resist what I think is going to be a turn to the more deferential over the next five to ten years. I do not predict that over the next year or two, for obvious reasons, because the composition of the Court, give one or two, will not change, but I do think that when (Thembile) Skweyiya and (Zak) Yacoob go off in eighteen months time, there will be a very serious question, as to whether the foundations that were laid are sturdy enough to withstand, what I think will be an assault. I leave you with that.

Int Thank you so much, Dennis, that was a great interview.

DD Pleasure.

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