Frank Michelman **Constitutional Court Oral History Project**

28th February 2013

Int This is an interview with Professor Frank Michelman, and it's the 28th of February 2013. Frank, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate your time.

FM I'm very much honoured by your inviting me to participate and I'm happy to do so.

Int Thank you. I've not had the opportunity to interview you before, and I wondered whether you could talk about early childhood memories, and some of the formative experiences that may have led you down a legal and academic professional trajectory?

FM Well, that's going to be difficult, because…because I didn't have any notion at all prior to my senior year in college, the year before I entered law school, that I would be going to law school. I hadn't formed, that I can recall, any plan, hope, ambition, in that direction at all. To the extent that I had any distinct career notion in mind during the years before I wound up going to law school? It would have been an academic career, possibly in the field of history, in which I was moderately interested and which was my concentration in college. I had formed a more or less definite idea of applying to graduate programs in history, and turning myself into a history professor. Probably United States history. United States history, or maybe something along the line of what's now called the field of ideas, which I was calling intellectual history in those days. I certainly had an interest in conceptual work of some kind. But lawyers, courtrooms, that wasn't a part of it. Owing to a series of interactions with my parents, I did wind up going to graduate school but it was in the field of law. And it came to seem more or less written in the stars at that point that I would go to work for a law firm probably in New York, in effect my native city. And indeed I did, I spent a summer between my second and third years of law school working at a New York law firm, and I spent the year following my graduation from law school working at that law firm. But some other things happened. I was invited to take up a position as law clerk to a Supreme Court Justice in Washington by the name of Brennan. Of course my firm was happy to release me for such an honorific position. I held it for a year, which was the standard duration. It was the early 1960s; it was the time of the so-called New Frontier, the presidency of John F. Kennedy. Like so many bright young people of my generation, it felt to me like that was something one didn't want to miss, and I found a job in the Department of Justice that kept me in Washington for another year. And in the course of that second year away from the law firm, I began to receive enquiries from a few law faculties about my

possible availability to assume a junior professorship, tenure track entry level, and all my academic juices just sprang loose.

Int So they sought you? Most unusual….

FM Well, no, not so unusual. In the environment in those days for top rank law faculties in the United States, that's the way it was. Law faculty hiring in the United States today is a highly organised, highly bureaucratised process. There are committees at every school, there is a central clearing house, there is a compilation of complex application forms, complete with exhibits and portfolios that's put together every year. There's a gathering, usually in Washington where people go for a first round of interviews, and there's a next round of fly-outs to interested schools to present a paper I mean, it's a highly organised business. In the early 1960s, which is when we're talking about here, it was not…faculties from time to time would see that there was a vacancy or that the time had come to hire a new young person, it would have been a "new young man." They would put their heads together, who among recent graduates is a person we would like to have? My phone was not ringing off the hook, there were only a couple of schools that called, but one of them happened to be Harvard. And so as things turned out, I did wind up as an academic and not as a legal practitioner. But the short answer to your question is that I remember no childhood calling in the direction of law at all. It was more an outcome of what I experienced as a set of chance events.

Int Perhaps. I want to take you right back. I'm very curious about family background and the role of intellectual development; how that process really began and at what stage?

FM Well, my father was a man of business. A man of business whose mind was certainly not closed to the intellectual side of life, or ideas. I think that he certainly would have had the capacity to develop himself in a more intellectually orientated mode of life, but it happens that his life developed in a different way. My mother was an avid book reader. She also introduced me to concert going and opera going. They were both serious about the value and importance of brainwork. I guess they sort of figured out that I was a…a Yiddish expression, a 'chachem', a smart guy. And there was nothing ever except total encouragement, in many ways that I won't try to go into. They certainly, early on, saw a future for me as somebody who was going to make his way with words and brains. And I guess at some point they figured it should be as a lawyer. And I had…(*laughs*) that was not shared with me until rather late in the game. So I had support and encouragement, including payment of prep school tuitions from my junior and senior years in high school. But I didn't have a role model. I didn't have a parental role model for this life I got into, but I did have all the help and support and approval for the tracks that I made that a child could want.

Int Frank, in terms of social justice, what were some of the formative influences? You were living at a time that was so historically important in terms of the civil rights…

FM I don't know exactly when I figured out that I was…that in the American scene I was a person of the moderate left, or somewhere on the left. That I had a concern in my head about economic justice, economic fairness. I'll tell you where, in terms of personal recollections, it probably began: in my elementary school. The school I went to from kindergarten through the seventh grade, is in New Rochelle, New York. New Rochelle was in part a bedroom suburb for New York. But it had a very mixed population. It had relatively affluent residents but it had a sizable, largely ghettoised…we would have called them in those days negro…population, and that population was on the whole in a different economic realm from where we were. And there was also a population of working class…they would have been many of them Italians. The city public schools presented an interesting situation. There plainly were some schools I should rather be in than others, if you were me. I happened to be in an excellent school that was quite mixed, and so I had childhood friends and acquaintances from the other side of town. It literally was "the other side," there were divisions, there were parks, and on one side of the park was where we lived, and the other side of the park was where they lived. But we met at school. I also had…it turns out that I had teachers who had views about social justice in the United States. I remember coming to school one winter day, it probably was one January day after the winter break, and our teacher talking to us about a trip that she had made to the southern United States during the break, and what she had seen and what she had experienced, and the segregated facilities, and even the drinking fountains and so forth. And of course, you know, there's a tone of voice and there's an attitude, and she's a model for me and an authority figure and that's the first…that's actually the first concrete memory I have of a social concern. And I had these schoolmates with whom I mixed every day. So that got firmly planted. Something was wrong. And I never had a doubt that was the racial factor. I was in my early years in college at the time that Brown against Board of Education was decided. I never had a doubt that that could be anything but right and of course that went with me to law school. One of my good friends and colleagues there, and a person with whom I shared an office with at the *Harvard Law Review*, was a man by the name of Antonin Scalia, whom you may have heard of. And I've often been asked about when and how we two became aware of political differences between us when we were law students? And the answer is, we didn't become aware of any political differences when we were law students. There were two big politically connected questions that law students, taking courses in constitutional law and so forth, would have been occupied with in the late fifties when we were at law school. One of them was segregation, Brown, and the other was McCarthy, free speech. Scalia and I were not one iota apart on these questions. It was relatively quiet political times for university students, and we

were not, most of us, a highly politically self-conscious and turned on group of people. But on these sorts of beacon questions at the time, we all seemed agreed. Segregation, how can you do that? And yes, McCarthy is a bum. I wasn't thinking in terms…I wasn't thinking in class terms or economic terms.

Int What about the Vietnam War, the draft, the students…?

FM I don't think the war had a major direct effect on me. I'm a half a generation older than the bunch for whom it was really a watershed life-shaping, mind-shaping event. It wasn't for me. I would say my political sympathies by and large were on the protest side; owing to some combination of slight seniority in age, and whatever my glands happened to secrete into my body, I was not attracted by the more vociferous tactics of the sixties generation in universities. Sit-ins, building occupations, that was a turn-off for me, I didn't like it much.

Int Interesting…

FM By the time it was really going I was a faculty member and I had to deal with it from that side, which might have had some effect on my…but I thought that, you know, I thought in terms of substance the politics of the end war movement were basically right. And that's a smart question, Roxsana, because I think…in 1969 I published an article about what later became known as the topic of socio-economic rights as constitutional rights. My article was an early, if not the very first entrant into that field. It suggested that there might be socio-economic rights in the United States Constitution. The fact that I wrote and published that thing then becomes the anchoring event in a long career of (not unbroken) attention to the question of the relation between constitutional law and economic justice, and it certainly was the seedbed for what followed. What pushed me into that? Now something that was personal to me, but it could very well be the fact that I was also negotiating my relationship with the student left. With an engaged student and junior faculty left that I hadn't completely signed on with. I was feeling some pressure from students whom I liked and whom I wanted to have like me, who were predominantly, or at least it seemed to me at the time, of a left, egalitarian and re-distributivist persuasion. Critical legal studies wasn't quite on the scene at that time. It didn't actually become a factor in my life until after I published that article, until the seventies. But something about what was going on among the students could very well have played a part in my choice of that topic. It was a piece for an occasion, I was invited to write the annual foreword for the Harvard Law Review's annual review of the Supreme Court. It's a prestigious invitation and so you have to really sit back and try to cook up something a little special for it. Also, aha! I had been reading work that was in circulation around Harvard, by a Harvard philosophy professor by the name of John Rawls. Whose book, *A Theory of Justice*, wasn't published until 1971, but there were drafts available for reading and I was reading them and…oh! Well,

yes, and I had clerked at the Supreme Court in the year starting September '61 to August '62 for Justice William Brennan. A Justice who many people see as having become a sort of intellectual dynamo of the Warren Court. And I found that experience completely simpatico, but there's also of course leadership and example setting and friendship So, the Warren Court clerking experience, the Brennan experience, must also have been formative for me. Anyway, with the publication of that article and a few more in the following few years, I plainly had staked out a position on the left of centre, in terms of social justice issues in relation to constitutional studies. So there you are.

Int I have it on good authority, especially amongst South Africans, that you are regarded as the American legal scholar who's made the most significant contribution to South African constitutional jurisprudence.

FM I won't make a response to that.

Int At what point did you become interested in South Africa?

FM By the 1980s, I had some recognition as a respected US academic in the constitutional law field. It was strictly US; I had never said much about constitutions or constitutional law anywhere else. I paid little attention to comparative legal studies or comparative constitutional studies. Amongst leading US constitutional scholars, I was identified as a person who had staked out an interest in social justice and distribution questions. And that was related also to work that I did in the field of property law and property rights, which was the other main concentration and teaching interest that I had. In the course of my teaching at Harvard Law School, I had met and formed a bit of a relationship with a guy who was a Harvard law student, while I was a relatively young Harvard law professor, by the name of Karl Klare. Karl (Klare) now teaches at the Northeastern University Law School in Boston, and he was one of the founding group of critical legal studies. He was a labour law guy and a man of the left. He was a man of the labour left. Karl (Klare) and I had a friendly relationship. Karl (Klare)…well, you'll have to talk to Karl (Klare) about this, but Karl (Klare) had developed some South African connections. He had a COSATU connection of some kind and I believe was in South Africa in April 27th 1994 as a poll watcher. And Karl (Klare) had a very good friend in South Africa by the name of Dennis Davis.

Int Whom I do know (*laughs*).

FM If you had told me you didn't know Dennis (Davis), I would have gotten up and walked out and said, this woman is not with it.

Int (laughs)

FM But Karl (Klare) should be on your list of interviewees. He's very much involved in this story. And he stands very high on the list of American scholars who have had an influence on South African constitutional affairs. Karl (Klare) is the author of an article called *Transformative Constitutionalism and Conservative Legal Culture*. He is the originator of the phrase, transformative constitutionalism. Okay…it's early 1994, it's the spring of 1994. All this excitement, elections, (Nelson) Mandela's elected president of…it's like magic is happening in South Africa. And my involvement in, interest in, connection with South African affairs at that time was that of a reader of the New York Times. I was an interested bystander, watching and cheering.

Int But what did you think of the violent politics of the 1980s?

FM Well, I didn't know much then about the violent politics of the 1980s. I knew there was apartheid, and I knew there was a repressive regime there, and I knew that some people had been shipped off to Robben Island, and were living out their lives there, and that some kind of thawing was going on and that people were being let out starting with Nelson Mandela. But I wasn't watching closely enough to see the violent politics and I certainly wasn't asking myself hard questions about the tactics of the ANC. The ANC was right and the apartheid regime was wrong. In the spring of '94, if you were a citizen of the world in the slightest bit, you had to know that something interesting was going on in South Africa. I had some notion that there was a new Constitution taking shape. I actually wasn't thinking much about the fact that a new Court had been created, and that vacancies would have to be filled. Now this is 1994, and those were the days in which you got letters by post. And I came back from teaching a class one morning and there on my desk was an envelope and the return was to a man in South Africa whose name I did not know, Dennis Davis. It was a somewhat formal letter. The author identified himself as the director of the Centre of Applied Legal Studies at the University of the Witwatersrand in Johannesburg. And the letter explained that one of the activities of CALS (Centre for Applied Legal Studies) has been to periodically organise what they call judges' conferences, in which they would bring together members of the judiciary and the Bar and some legal academicians, for discussions of questions of mutual interest and concern. And Dennis (Davis) wrote to me that we have a new Constitution, and a new Court being appointed, and some interest has been expressed in having CALS (Centre for Applied Legal Studies) organise a seminar for two or three days, at which we would hope to have many of the justices on the new Court and other jurists and advocates and law professors would come to discuss constitutional interpretation with respect to Bills of Rights. This will be a new development for us, and it's been suggested that we should perhaps get up a team to talk with from an experienced country. And Dennis (Davis) wrote that he had been directed to me to see whether I would be willing to be engaged to take a lead in helping to organise such an event. I wrote back and I said, yes, I want to do this and we settled on some dates, and then Dennis (Davis) suggested that I get in touch with Karl Klare, who's also agreed to assist. As I later came to

know, Dennis (Davis) had been directed to me by Karl (Klare), as someone with standing in the constitutional field who would approach the project in a sympathetic frame of mind

Int I'm curious about your memories of that seminar and the core issues that were raised?

FM I'm giving you two sets of papers here. This is the 1995 seminar. We did another one, one year later in '96. You'll find some interesting looking names.

Int Yes, everyone who's a who's who of the South African legal fraternity…

FM Now I'm giving you a similar set of sheets from the '96 seminar. This one actually has a list of the problems that we wrote and prepared for discussion at the '96 conference, and you'll look through so you can see the kinds of things that we thought of putting up to them. And I think you'll see that there's a fair amount of foresight in there about…with each one of them…if you know the constitutional jurisprudence at all, for each one of those you'll think of some case or cases that later came.

Int Exactly. Incredible.

FM You'll think of the *Carmichele* (*Carmichele v Minister of Safety and Security*)case and the *Fourie* (*Minister of Home Affairs v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*) case. I couldn't find the equivalent package in my papers for '95. But CALS (Centre for Applied Legal Studies) must have it on file. We were asked to put together a delegation and the names of that delegation are on there (reference to paper noting the names of the 1996 Judges Conference North American Delegation). And they're all really terrific (Kimberle Crenshaw, Karl Klare, Louise Hope Lewis, Patrick Macklem, Elizabeth Schneider, Kendall Thomas) people. And we started a process of communication with CALS (Centre for Applied Legal Studies) and we said to them, okay, you know, we're US law professors and we have a certain way of presenting things. We don't go and lecture to our classes. We give them cases and problems and they come to class and we discuss them. We're going to have to acquaint ourselves with the Interim Constitution. We're going to have to study it. We're going to have to study the Bill of Rights. We'd like to propose to you that we will come up with five or six problems. And that we would run the seminar by organising the attendants into groups and assigning the groups to argue for one side or the other, and will your judges and others do this? And Dennis (Davis) came back and he said, this sounds fine and it's a yes. He said there are two conditions. One was that if we wanted the judges to engage they'll need to be assured that what they say is not going to be appearing in a newspaper the next day. So it's got to be strict confidence. No problem for us,

that's fine. The other condition I believe came back from Arthur Chaskalson. He said…and I believe this is a direct quote…not too close to home. Well, does that mean that these problems can't be interesting and touch on nerves? No. I think it was late enough in the game…when that message came back, it was late enough so that we knew that Makwanyane (*S v Makwanyane)* was going to be the first case argued. We knew the death penalty was going to be the first item on the agenda, and we figured out, I think accurately, that what he was telling us was, do not give us a death penalty case. Because of course he didn't want to jump the gun on that one. So we got that message. And so then we exchanged drafts, we wrote the problems then we'd exchange them with people at CALS (Centre for Applied Legal Studies) on the Wits (University of Witwatersrand) law faculty, because we didn't want to write a problem and it would involve some social situation that just wouldn't happen in South Africa. Or it would be wrong, it wouldn't fit the scene in some way. So we wrote them and then we would get suggestions back.

Int As exciting as this sounds, Frank, it must have been terribly difficult, given that you hadn't visited South Africa; you didn't know the situation or context?

FM Well, that's why we were collaborating with South African colleagues, and we got a set of problems that they all thought were fine. We met in Jo'burg, the group of us, for a day or a day and a half, before we went off to a place called Valley Lodge on the Magaliesburg, up north. It's a kind of a resort type conference centre where there was a little game park connected to it. You can see some elands off on the hills. My wife and I actually went a couple of days ahead, and we went to the Cape and hung out in Cape Town for a couple of days, and did the tourist things, and that's where I wrote out that speech, a copy of which was later published and that you have. Because I knew I was going to be called on for that. That was an after-dinner gathering our first evening together, people sitting around a barroom with drinks, and I gave that talk. It was the first evening of the seminar, people were just sort of getting to know each other. So we go off to Valley Lodge and we give the seminar. Now of the…

Int Eleven…

FM Eleven…well, it's actually twelve. Twelve because Richard Goldstone was off at work in the former Yugoslavia, and Sydney Kentridge was filling in for him. I can tell you who wasn't there from the Constitutional Court and the rest of them were. (Arthur) Chaskalson was not there. (Pius) Langa was not there. Laurie Ackermann was not there. That's three. Sydney (Kentridge) was not there, and Richard (Goldstone) was not there. And all the rest of them were there. So these were really an interesting bunch of characters that we met. Albie (Sachs), John Didcott, (Ismail) Mahomed, Kate O'Regan, Yvonne Mokgoro, Tholie Madala, Johann Kriegler. I mean, these were not quiet, shy men and women. And we really had an enjoyable time with them at this

seminar. Also with AD (Appellate Division) and High Court judges in attendance and leading advocates. I remember meeting Wim Trengove, and others. It was really, you know, for an academic schnook like me, it was really something. we had a great time. And the consequence for me was that I got hooked. I mean after that I had a stake in this venture. It wasn't my country and it wasn't my Constitution, it wasn't my Court, but I was a very interested observer. And of course, you know, we wanted to keep up and know what was happening. In later years at Harvard Law School I taught courses and seminars on the South African Bill of Rights, as a comparative constitutional law study. I twice taught that course in partnership with Richard Goldstone. I once taught it in partnership with Dennis Davis. That's one of the side benefits of this, is just getting to meet and form friendships with some terrific people. Dennis was one. It turned out later Arthur Chaskalson would be another. Incredible human being. But he was just a name to me at the outset. And I didn't get to meet Arthur…I don't think he came to the second seminar either. I don't think I ever met him until at an academic event in 1999 at…what was RAU (Rand Afrikaans University) then, it's UJ (University of Johannesburg) now. But I came home and of course we did have Internet, and I began keeping up with all the judgments. And then there was a desire for a repeat and a second chapter of the seminar, which we did in January '96, and you have the papers from that. And it was becoming a second occupation for me to try to keep track of South African constitutional law, see what was going on. I began to have a little bit of a sense of the personalities. And so it went. And there would be occasional invitations to come and participate in a conference or seminar. I would write a paper, it would be published. The editors of the big multi-author treatise Constitutional Law of South Africa, invited me to contribute the chapter. Over the years I've taken part in quite a few conferences, gatherings, and events in South Africa. Of the other people in the group we put together to bring to South Africa, the one who has kept most closely involved I think is is Karl (Klare). Karl (Klare) has been about as close and involved a follower of constitutional events in South Africa, and a frequent contributor to discussions as I have. There are certainly other US scholars who have an important part in this, but they weren't part of this particular group. Stephen Ellmann would be one who would quickly come to mind.

Int Thank you.

FM As I've said to you, probably on five or six occasions I gave a course or a seminar at Harvard Law School on South African constitutionalism. This exposure to South Africa actually got me interested more generally in the field of comparative constitutional studies, and I have been teaching and writing in that field. So this was a huge bend in the road for me. But this is all about me, and you want to talk about the Constitutional Court.

Int Well, I'm coming to that, but I'm just curious, in 1995, when you get to South Africa and you write that speech, you wrote it in Cape Town, you told me. I'm

just curious because you took this position where you actually took two steps back and said, as an American I can't really lecture to South Africans. And it seems to me that that was just the most astute move ever, because South Africans, from my experience, don't take kindly to others coming in and telling them what to do. Where did you get that sense…?

FM That speech was written from beginning to end, was thought out from beginning to end, in twenty-four hours. I think it was only a day or so before we left home that I heard they would be expecting an informal talk from the head of the US delegation. So I was thinking about it on the plane and it seemed like kind of an obvious thing that a group of American law professors, who were, for the most part, even practising lawyers, much less ever had the responsibility to sit behind a Bench and rule on a case should not be coming on like gangbusters and saying we know the story and you don't. We were not South African and hadn't lived through what these folks had lived through, hadn't fought through what many of them had fought through. There's Albie (Sachs) without a right arm. John Dugard…I'm going to lecture to John Dugard about human rights? I knew of the kinds of stuff that he had been writing during the hard times, and how much courage there was in what he had been doing. I also knew that it's not as if we were going into some country where the idea of a modern legal system has just now burst on someone's mind. This is a legal culture that has some of its main roots in European jurisprudence going back to the seventeenth century in the civil law tradition, it's got deep roots in the common law tradition. These are lawyers and scholars who have had…not only had some serious centres of legal education at home, but many of whom have gone off to study at Leiden or Cambridge or Oxford. So my sense was that here we different branches of descent from European legal culture going back centuries and now coming into contact, and it's not as if one group comes in with empty heads and the other comes in with all the understanding.

Int You make some very important points in that seminar and the paper you gave me, one of which is you advocate a move away from the Westminster Roman-Dutch Law, and you also in some ways really point out that the South Africa Constitution and the Court has a tremendous opportunity in actualising and creating rights. I wondered whether you could talk about that, because it seems to me that that's the most exciting part of what was going on?

FM We have a watershed – "transformative" – moment in the history of the country but it's not as if the pre-existing accumulation of legal experience, wisdom, culture and habit is all going over the side. That's not the way this was. The going legal system was continued across the bridge into the new era, with some modification: the introduction of one new Court and a supreme law constitution, a Bill of Rights that is going to take precedence over acts of Parliament. Not small change. But still there was an important concurrence on legal-system continuity reached in the course of the negotiation from '89 to

’93. You would get up tomorrow morning and the case that was pending at the High Court on a lease yesterday, would still be pending at the High Court on the same lease today. But what about the manner and style in which the case would be argued and considered? Will it be just the same habits, the same formalities, the same formalisms? According to what I had been learning, the South African legal culture had been in some rough sense more formalist in mode and style than mainstream US public law culture is these days. More focused on text, more focused on deductive kinds of reasoning, if you can possibly find it to decide a case. More prone to be deferential to the statute. But it’s a watershed moment, and this Court has been created to take a leading part in a social transformation and upheaval in South African society. The achievement of equality, the recognition and protection of human dignity, the rule of law and the supremacy of the Constitution. I knew I was not talking to people who were short on legal sophistication. Many or most of the people in that room knew about American legal realism and its attacks on legal formalism. They knew about the critiques of textualism and intentionalism and all the rest of it. You don’t want to come and say, hey, I’ve got all this great new thing you’ve never heard of to show you. You want to say, we have on hand an array of approaches, and some of them are ostensibly more objective in orientation, some of them involve more of an admission to the fact that the judge is contributing something to the values in play as well and thus responsible for what or she contributes. So I put my message largely in the form of a prophecy or prediction. This is where you’re headed, these are the problems and choices and dilemmas you will faced, because you are in the position of administering a transformative constitution. It was about setting a stage for what were going to be two days of discussions of hypothetical legal cases that we put together and also trying to give our audience an idea of where we were coming from as progressive-minded U.S. legal scholars, and how we would likely be looking at it.

Int And at that point, reading the Interim Constitution, did you have concerns about how the language…the use of the word ‘Rights’. I’m wondering what your concerns were at that point?

FM Oh well, that’s interesting. I have to answer it by fast-forwarding ahead to use language and categories that I wouldn’t have been using at that time. Because my take on this project and this process, has obviously matured over the years and probably changed as well. My first reaction on reading the Interim Constitution was glory be, this Constitution has provisions in it about how laws get made, and about what powers the executive branch has, and how the President gets elected, and it also has a Bill of Rights that lists not only things that lawmakers are directed not to do, but interestingly things that lawmakers are positively directed to do. That’s not a part of the American scene. But I had been writing about poverty and constitutional law, and I was very much onto issues about constitutionalising positive obligations, what turned out to be in the final Constitution, 26, 27, 28, 29. So social rights in a Constitution were very much an issue on my mind, and the problems and

puzzles that are presented, as well as an issue that became known as the question of horizontal application, the ways and means of bringing the social ideals of the Constitution to bear on ordinary civil relationships, landlord/tenant, debtor/creditor, commercial contracts, and so forth. The horizontal application question. And there I am looking at these Constitutions and I say, good heavens, here it all is! Horizontality didn't become explicit until the '96 Constitution, but you can see the seeds of it in the Interim Constitution. The social rights weren't explicated until the '96, but even before you could say that with this Bill of Rights, they can go and decide cases in ways I've been wishing my Supreme Court would decide cases. I saw it as representing the best side of the western, liberal, constitutional-democratic tradition. The tradition that I worked in, the tradition that my ex-boss at the U.S. Supreme Court, Brennan, represented to me, as well as political thinkers like John Rawls and Ronald Dworkin represented to me. I was very happy to have the chance to lay any small part in this. That's what I saw. And then I watched the decisions coming down from the Constitutional Court, over the first few years, thinking my Supreme Court wouldn't have done it that way but they can, and I'm one of progressive-minded, egalitarian liberals in the US joyfully watching the outputs of this Court, violence against women (*Carmichele v Minister of Safety and Security)*, gay rights *National Coalition for Gay and Lesbian Equality v. Minister of Justice, Satchwell v. President of the Republic of South Africa and Another, Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae), J and Another v. Director General, Department of Home Affairs, and Others,* Same sex marriage (*Minister of Home Affairs v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others)* , affirmative action ((*Minister of Finance v Van Heerden*). And the decisions are generally very capably reasoned and written, some eloquent and some more workman-like. You look at this and you say, well, I might have a difference here or a difference there, maybe there was an unfortunate outbreak of old South African legal formalism here or too little boldness or explication there. But you look at the thing generally and you give it very high marks for legal craft and for humanity and compassion. And so the South African Constitutional Court burst on the scene of world comparative constitutional studies and within two or three years is sitting there as one of the leading participants in the global conversation of judges, as it came to be called. Canada, US, Germany, Israel sometimes, South Africa…India, South Africa, they're right there. Eliciting tremendous admiration and respect in an amazingly short time. You asked me, what was my sense at the beginning? My sense at the beginning was consistent with that. I could see the possibility that this would happen. It didn't totally amaze me that the Constitutional Court of South Africa so quickly assumed a position of worldwide respectability leadership. A question that did not occur to me at the time was, yes, but this is a Sub-Saharan African post-revolutionary setting and how might that matter. I could see the Constitutions, both of them, trying to deal in some way with a question of something called Customary Law. I could see that they're both written to pay their respects to customary law, but also to subordinate customary law and customary jurisdiction to the Bill of Rights But I am a

westerner, I don't live my life as a rural traditional South African. From the beginning, there were liberal-minded scholars (not me) looking at this scene and saying, you know, this is not going to be easy, and there are some problems here and then of course you have some judges. You have Yvonne Mokgoro, you have Sandile Ngcobo, who are focusing more on the customary law question, and in a couple of cases disagreeing moderately with Court majorities about how to decide a particular case so as to pay a little deeper form of respect to the customary law, the indigenous leadership. But that's only a fraction of a deeper question. It did not occur to me at the time to wonder whether…is this a graft that's going to take? Or that it might not be just a clash-of-cultures question but also one about political styles and expectations. The 1996 Constitution in section one, describes South Africa as a multi-party democracy. It's not. What's it going to take to get us there? And how are things going to work during the period of time when it's not a multi-party democracy and when the leadership positions are occupied by people and organisations having to learn their way into liberal-style constitutional democracy while working under harsh pressures of demands for prompt reversal of the social and economic results of a prolonged state of formally legalised, atrocious oppression, which have left a frightening fraction of your population not only ill fed and ill-housed and ill-clothed, but ill-educated? Do you move directly from that to western-style constitutional democracy? Is it just a matter of "rights" that we have to deal with here or might it also be one of political practices and expectations and communicative styles? What about this style of communication and debate, which we call legal, in courtrooms with guys with wigs and robes and gavels? That set of questions, which has become much more salient, I think, over the ensuing years, was not bothering me then. The Court was formed and staffed by exceptionally able and right-minded judges. Arthur is a legend in himself. If you know anything about the other judges, you know there's not only true, high ability there but also the stuff of legend in (Ismail) Mahomed, in Albie (Sachs), and so on. And then of course we have…this is not a small piece of the picture, we have Nelson Mandela. One of the first things the Court does is to declare unconstitutional a major executive order, a proclamation that he's issued, it's going to get local government up and running in South Africa, and they tell him he's violated the Constitution (reference to *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others)* to . And what is the first thing (Nelson) Mandela does? Comes on and says, this is why we have a Constitutional Court. And it all looks great. And it is great.

Int Do you think that's enough to give a Constitution legitimacy? And to give a Court legitimacy?

FM I don't think that's enough to give a Court or a constitution legitimacy, but without it, the chances of either gaining legitimacy are going to be seriously harmed. If (Nelson) Mandela at that point had said, you know, who are these guys to tell me how to run the country? I need to be careful here. I don't think either of the succeeding presidents has ever exactly said the wrong thing.

Perhaps some ministers have. But things have changed since 1996. As of then, you had eleven members of the Court, handpicked by President Mandela to be on board with the project of transformation by and through law. That does not last forever. Terms come to an end, there is turnover, the Court necessarily and appropriately becomes more politically representative, more varied in outlook and hence more prone to division and difference. Nelson Mandela does not make the appointments now. The Court loses some of its sheen, it's not brand new anymore, its creation no longer registers as the key institution that got the negotiation across the divide. We've settled down now into post-transition life, the Court can't do its job without sometimes getting in the way of some powerful people or else disappointing others, and it's no longer so evidently unified. There are divisions of a different and deeper kind than we saw in the early Court. How does all of that affect the prospects for legitimacy? I am not close enough on the scene to answer.

Int What did you think of the choice of *Makwanyane (S v Makwanyane)* as the first case?

FM I don't recall having any thoughts at all about that at the time, whether I would have chosen this as the first case to hear. I thought, well, this is the one that came up. An interesting point, though, is that it's not the first judgment that they handed down although it was the first to be heard. The first judgment to be announced came in a case called *Zuma against the State (S v Zuma and Others)*. It involved a criminal-procedure question and yielded an interesting judgment written by Acting Justice (Sidney) Kentridge. I do remember thinking, how smart of them to make their first public utterance in this easy case reversing an apartheid era error. It's a human rights case, not one of blazing significance but still a case on the right against self-incrimination, something that matters for us who follow these things. And while the case does not present any difficulty of decision, it did provide Justice (Sidney) Kentridge and the Court with an opportunity to say something reassuring about their approach to constitutional interpretation: "The Constitution does not mean whatever we might wish it to mean." So that I thought was good. That thought I do remember having. If you ask me today what I think about doing the death penalty so soon, I would say well, the die was cast, nobody was in any doubt about what the outcome of that case would be or that it would have the strong backing of the country's political leadership if not of the full body of citizens. I think any experienced court-watcher must have understood that when noticing that the case would be the first to be heard by the new Court.

Int It was also interesting in terms of judgments because they were all written separately…

FM That did not surprise me. They all wrote separately but you didn't have a doubt that (Arthur) Chaskalson's was the lead judgment. Everybody else is a

commentary coming in from one angle or another to highlight a theme or an approach. I don't think you can find a paragraph in any of the other judgments that expresses a head-on disagreement with anything in (Arthur) Chaskalson's. Maybe you could. I haven't searched through the hundreds of pages looking for it. But I don't think so. I think they would have been very careful about that in any event. If I had been in President (Arthur) Chaskalson's position I would have thought something like, it's either going to be one judgment or eleven, but no number in between. A number in between suggests division and disagreement. But eleven doesn't suggest that, it suggests we each have a mind and a voice and we want our several minds and voices to be heard on this inaugural occasion. I don't have any inside knowledge about this, but anyone can see that the Court was very noticeably unified through the (Pius) Langa Chief Justiceship. There were a few divisions, but so few that you really noticed them when they came. Of course you expect some differences. What kind of a court is it going to be where there's no disagreement? But differences were almost always at the level, not of basic principle but of the application of basic principle to the assessment of facts in the case. So it was in the *Prince against the Law Society ((Prince v President of the Law Society of the Cape of Good Hope and Others)* where there was a memorable (and rare) close division of the votes. On the main issues of constitutional principle and interpretation, they are in full agreement, only coming apart at the justification stage of the analysis as to whether the State has sufficiently important set of interests in controlling the trafficking in cannabis to be able to outweigh Prince's religious freedom. And it's a very close balancing. The main issue of principle in the case was whether general regulatory laws serving obvious public purposes, and not directed at religious practices specifically, can ever be constitutionally impeached as a violation of freedom of religion. They all answered yes, which is sharply contrary to the American position. They all easily found an infraction of Prince's right to religious freedom, it will have to be justified by the State, and they disagree over the weight and sufficiency of the state's justification. Of course disagreement of that kind can be consequential. If you ask progressive-minded US observers, are there some decisions of the Court during those years that you really wish had come out differently. Prince would be on the short list, along with maybe *Volks v Robinson* and the prostitution case…

Int *Jordan ((S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae).*

FM *Jordan* (*S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae*).

Int I wondered if you could talk about socio-economic rights. There's a sense in South Africa that socio-economic rights, the Court hasn't met socio-economic rights sufficiently, they haven't addressed it, and that there's no coherent

jurisprudence on how they approach socio-economic rights, what's your perspective on that?

FM Well, I have a lot of friends involved in this discussion. I'm a little bit off that view, I'm more inclined to defend the Court. *Soobramoney* (*Soobramoney v Minister of Health (Kwa-Zulu-Natal)* seems to me to be the case where the die is cast. And if you think the Court got it right in *Soobramoney* (*Soobramoney v Minister of Health (Kwa-Zulu-Natal)*, which I do (and I don't think of anyone I know who does not), then what follows on, I think, was more or less foreseeable. Here you have an applicant who is going to die soon if he doesn't get access to a dialysis machine. He's claims his right to life and his right to have access to health care services. And what the Court apparently saw in *Soobramoney* (*Soobramoney v Minister of Health (Kwa-Zulu-Natal))* was that the first thing we've got to figure out about sections 26 and 27, is whether they create individual subjective entitlements – so a person's rights are violated as soon as and whenever he lacks the means of access to needed health care services – or rather we read 27(2) and 26(2) to set the limit of the State's obligations with respect to the rights described in the first clauses of those sections. What they decided in *Soobramoney* (*Soobramoney v Minister of Health (Kwa-Zulu-Natal))* was when it's the State who's the respondent, and the claim is one of failure to deliver on the positive obligation, the social right is to be construed as, what I call, a programmatic right. The right that I as a South African citizen have in that respect is not a right to have the medicine or the machine that I need, it is a right to have the State exert itself appropriately in the direction of everyone's being able to have what they need. I can go to Court and sue for violation of that right. It's a complaint that the government has not exerted itself in the constitutionally required way. That's the bridge they crossed, I think, in Soobramoney (*Soobramoney v Minister of Health (Kwa-Zulu-Natal))* they decided that this would be treated as a programmatic claim and not as an individual entitlement. I think that was a wise judgment, yes, I think that was a wise, almost inevitable decision. I could find a way read the text to come out the other way but I think the Court got it right. Do you know the name Theunis Roux?

Int Yes.

FM Are you talking to Theunis (Roux)?

Int If he ever comes this way, or if I meet him in South Africa?

FM You're not going to go to Australia to talk to him (*laughs*)?

Int No (*laughs*).

FM Theunis (Roux) has done important work on this, I think. The Court is situated in a complex situation. If we say that this Court or any Constitutional or Supreme Court has a long-term assignment to exercise its adjudicative powers so as effectively to constrain state action toward coherence with leading values of the Constitution, then each day the Court has to live to fight another day. It can't get itself involved with kinds of heavy lifting that it will visibly and miserably fail to do. It has to have some kind of regard consistent with the legal legitimacy of its decisions for how other powers in the State are going to respond to its judgments. So think about the *TAC* (*Minister of Health and Other v Treatment Action Campaign and Others*) litigation. If the *TAC* (*Minister of Health and Other v Treatment Action Campaign and Others*)had not been there, if all the softening up had not been done, if the government had not thus been brought close to giving in on Nevirapine distribution in South Africa, the Court would not have been able to do what it did, at least not nearly as safely. The TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case is the great success story in the programmatic enforcement line, and it works by a partially deliberate…partially accidental, but partially, I think, deliberate phasing, implicit collaboration between social movement activists and South African courts, Each of them taking a step that makes it a little easier for the other one to take the responsive step…so that between the *TAC* (*Minister of Health and Other v Treatment Action Campaign and Others*) and the High Court…and the Constitutional Court, and some quiet government concessions, they were able to work it out. Now back to *Soobramoney* (*Soobramoney v Minister of Health (Kwa-Zulu-Natal))*. It's to be programmatic, if it is not we're going to have queue jumpers and we're going to wind up with cases on our doorstep that we have no way of handling or managing. And we have experience as jurists in South Africa, through the administrative law tradition that comes out of British public law, of actually being able to review under a reasonableness standard, what's going on. This is the way we're going to go. Then along comes *Grootboom* (*Government of the Republic of South Africa and Others v Grootboom and Others*), and in *Grootboom* (*Government of the Republic of South Africa and Others v Grootboom and Others*) they follow the model and they adopt a purely declaratory judgment, they don't order anybody to do anything. Ms Grootboom won her case but she died without ever having had a house. So did the Court's intervention in *Grootboom* (*Government of the Republic of South Africa and Others v Grootboom and Others*) had (have) some beneficial effect on the speed and motivation of State activity in the housing field? Probably, yes but the Court's powers are limited. If you have State agencies of limited skill and limited resources, the only variable that you can effect is motivation. When the Court orders the education ministry to deliver textbooks, they do and they don't. Or they don't and they say they do, or they almost do but they don't quite. And if the same pattern of response occurs with too much regularity over a sustained period of time, the Court's influence as an effective political actor will start to slip away.

Int I suppose that comes to the question that NGOs in South Africa are asking about; what does it take to then get actualisation of rights?

FM Let me say just a few more words about the social rights cases. After *Grootboom* (*Government of the Republic of South Africa and Others v Grootboom and Others*) it's *TAC* (*Minister of Health and Other v Treatment Action Campaign and Others*) and then we get the Johannesburg water case, *Mazibuko (Mazibuko and Others v City of Johannesburg and Others)*. And that has produced a lot of unhappiness amongst the people I converse with. My thought basically has been, listen, the Court has committed to the programmatic approach, and they're going to stick with that. And whether they carry it out by making noises about a minimum core or about something else, is not going to make a difference. I have been persuaded that under its own reasonableness standards the Constitutional Court could have made a more vigorous cross-examination, so to speak, of the city defendants in terms of their available resources, their budgets and so forth, especially with regard to the contentious question of the pre-paid meters. But the problem with that case, and maybe it's a problem that goes back to the decision to make this a leading, exemplary case, in some ways…if you look at (Kate) O'Regan's judgment, what she basically says to the petitioners is, you've got what you asked for. You didn't get it by an order of this Court, but because over the course of time the City has modified its position and now you are getting the number of free litres per month that your expert testified you should have. It's working, then, this programmatic approach with its conversational exchanges of information and views between the bureaucracies and the judiciary and civil society organisations. From the standpoint of a Court that has reasons of high responsibility for not wanting going out of its way to pick fights with the State, with the government, that is a an understandable, respectable response. So I'm not a sharp-edged critic of the Court's performance on socio-economic rights cases. Sorry, what was the next question?

Int We were talking about how then do judgments then succeed in actualising rights in terms of having a government that may not be reasonable?

FM Well, I suppose it depends a lot on the kind of case you're dealing with. No convict that I know of has been executed in South Africa since 1996. Same sex couples are getting married. Speech sometimes quite vituperatively critical of government seems to remain freely in circulation.

Int It's the basic rights that these NGOs…

FM Regarding the classical liberal negative rights and the anti-discrimination rights, I am not aware that there is a visible problem of compliance on the highest leadership levels. If you get down to street level policing – but this would be true in the United States as well – we will find violations of people's constitutional rights. So has the rights culture penetrated all the way down the

South African police force? No more so, one would guess, in South Africa then in many other countries. Does every South African politician behave in a way that shows full and robust respect for the liberal idea of freedom of political speech including harsh criticism of official performance? Well, no, they yell and complain and they think there needs to be a code for this and that and that the presidency must not be cartooned in a way that's excessively insulting or demeaning. But very similar discussions take place elsewhere around the world. Mr Shapiro (pen name Zapiro) is still out and free and walking around and one can expect that will continue to be the case. Somebody removes a painting from a museum wall, that's an extremely bad event I would agree. But to the extent that, on the civil liberties front and so forth, things in South Africa are pretty good compared to the average for the world, I think that the Court's presence and the Court's declarations may have had something to do with that. That is certainly true in the marriage context, and probably in the death penalty context. So, is the Court doing its job? Has it been effective? Well, yes in many ways up to now, I think so. Probably the fact of the Court's presence along with its judgments does exercise a certain kind of influence and restraint. There hasn't yet, I believe, been a prominent politician in South Africa who has said we need to do away with the Bill of Rights, or even who has said we need to do away with the Constitutional Court. If you ask me do I think there are any prominent politicians or others in South Africa who would like to do away with either or both of them? I think the answer would to that is undoubtedly yes, but no one's felt quite free to propose it yet.

Int You talk about comparison with other countries, NGOs in South Africa argue that because of the lack of direct access, a Court like…they point to India, which I think has problems, and then they point to Latin America: Brazil…the courts having a much better kind of legitimacy because of its direct access, unlike South Africa. And I wondered how you would compare South Africa's Constitutional Court?

FM Well, I don't know as much as I ought to about the overall picture in the Latin American countries that people have in mind. Columbia, Brazil, would probably be the two most likely ones. My guess is that if you look very closely you'd find mixed pictures there. You would find that some of these judicial interventions may be getting in the way of what would at least arguably be the most rational and efficient ways of getting needed goods to those who need them. You would find that there is a certain amount of queue jumping so people who can get a lawyer to file a lawsuit for them, get something, but that other people who aren't in a position to do that, don't. It's also the case that – I think this has particular application perhaps to Columbia, that the formally established system of democratic politics through parliamentary representation has been so visibly broken…corrupted and broken, that a Court is on safer ground than it might be otherwise to move in and pick up some of the slack. Right? Because if nobody else is doing the job then the Court has to do the job, and will get credit from a country for doing it. But the

same condition does not prevail in South Africa. Whatever one may think about this or that Act of Parliament, South Africa has a working parliamentary system. And for a Court to open its doors wide to a lawsuit from everybody every day about political grievance doesn't work the same way, where you have a visibly organised and disciplined party setting an agenda for Parliament and seeing it through. However much anyone may regret the fact that it hasn't become a multi-party system yet, you cannot look at the South African Parliament and say, this is non-operative, it's out of business. It's a major differentiating factor in my mind. And the fact is that the South African Constitution, section 28, has a very generous provision for *locus standi* and constitutional litigation, and the Court has construed it so that almost anybody actually can bring a case to the Court. You will almost always have to go to the High Court first, and you may have to go to the SCA. Does the Constitutional Court take enough cases in the course of the year? Could they decide more? Could they be busier? Very hard for me, not being involved in a legal practice in South Africa, that's a hard question for me to answer. But I wouldn't be surprised if they could be a little busier. Maybe so, and maybe that's something that needs to be discussed. In some ways, of course, they have been much more widely engaged than courts in other parts of the world, including my country, would be, and that is owing in important part to differences in the way our respective constitutions are written and designed. Mr Glenister would never have had his **(***Glenister v President of the Republic of South Africa and Others)* case decided by our Supreme Court, they would have called it a political question, it's not the kind of thing we adjudicate here. MP Mazibuko's claim about scheduling a no-confidence resolution for a vote in Parliament couldn't have gotten anywhere near a court in the United States. You look at my speech at Valley Lodge, I made a point about even in cases where you can't grant a remedy, you might be able to make a constructive difference by giving some kind of an affirmation that there's a right here that has to be respected. Judge (Dennis) Davis did that in *(Mazibuko and Others v City of Johannesburg and Others)* Mazibuko's case, he said she's got a right but I as a judge cannot tell the speaker of the Assembly what to do. That case would have been hooted out of court in the United States. The e-tolling (*National Treasury and Others v Opposition to Urban Tolling Alliance and Others)* case, I doubt would get anywhere near a court in the United States. We'll see what the Constitutional Court has to say about it. The whole series of cases about the parliamentary obligation to engage with the public, *Doctors For Life* (Doctors for Life International v Speaker of The National Assembly and Others), *Matatiele* (*Matatiele Municipality and Others v President of the Republic of South Africa and Others)*, would not be litigable in the United States – cases involving challenges to the manner in which the other co-equal institutions of government conduct their business are treated as non-justiciable here but it is different in South Africa. Whether for good or for ill is still, I think, a fairly open and debatable question and may not have a simple, one-word answer.

Int I'm wondering, in terms of legitimacy and constitutional patriotism, I wondered whether you could talk about constitutional legitimacy and how you define it and how you think it pertains to South Africa?

FM I think I've already said something about that, so this may be a little repetitious. I'm pretty much falling in line with Theunis Roux, with his ideas about this. The Court has been set up as an institution that's expected to make effective interventions from time to time, into the conduct of business by state actors and civil society actors, with a view to ensuring, as far as it lies within the Court's ability to do, respect for and compliance with a set of values and principles that are written into and are read out of an instrument of higher law called the Constitution. If you try to construct an arithmetical function that would represent maximum total achievement along this line, it would have a temporal dimension, right? Because what you do today will have some immediate impact today; it will get gay people and lesbians married, and it will also have some down-the-line impact on whether you'll be able to do the same thing or something of similar import tomorrow. And that's because the Court doesn't operate as an all-powerful decider. The Court can decide something and then what the consequence actually is and the way of implementation on the ground remains to be seen. And furthermore, the Court has no way of guaranteeing its own perpetual continued existence into the indefinite future. As it happens in South Africa now there is one political party that may control a sufficient fraction of the Parliament to be able to amend the Constitution, more or less at will. (I'm not sure that's actually right with respect to every kind of amendment.) So the way Theunis (Roux) breaks it down, which I think is very interesting. He says the Court operates in a field where it is subject to a number of different vectors and forces and pushes and pulls. And remember, it's a field in which the idea is for the Court over the long run to be able to carry out its assigned function of contributing towards the conformity of state and social behaviour to the norms and values of the Constitution, by issuing orders or decrees or by whatever other means it has in its control. So he says, in managing its conduct…it's own conduct and decision-making the Court of course seeks to decide the case correctly, the judge wants to decide the case in a way that is true to the principles and values of the constitution and any other legal factors that have a proper bearing on the decision. In (Theunis) Roux's vocabulary that is called legal legitimacy. The community of lawyers and jurists, within South Africa and maybe to some extent outside South Africa, looking on, has to be able to say, yes, that's a proper decision; I might have decided the case differently but that is a legally respectable decision and reached by a legally legitimate and respectable course of reasoning. Theunis Roux quite reasonably suggests that the Court won't continue to be influential or powerful in the way in which a Court can be powerful if it doesn't have that kind of legitimacy, and it's obviously very important from the standpoint of the judge's own internal sense of what he's doing there and so forth. Then there is the question of…I think (Theunis) Roux has sometimes called this popular legitimacy. There has to be a certain continuing level of support or at least acceptance by the public. So

that this Court feels some sense of comfort, some sense of security, some sense of legitimacy, sees some reason to go on. And the third one is what (Theunis) Roux calls institutional security. And that has to do with the receptivity to the Court's operations, not of the general public, but of the other holders of power in the state. The leading party. The executive branch. And to some extent the major/minor bureaucrats who are either going to obey or not obey Court decisions. So the Court has to worry about its institutional security, how it's getting along, with the ANC, its social or public legitimacy, and its legal legitimacy. I think that's a pretty good account, and what I like about it is – you can see this reflected, for example, in the death penalty case (*S v Makwanyane)* – it's not just a hard-nose political scientist's account with no normative or idealistic or aspirational input to it. Because there are two ways these considerations are taken into account: by outsiders assessing how well the Court is doing, and by the judges themselves in figuring out what they ought to do right now. The way (Theunis) Roux has set up the factors, they are all subordinated to the overarching idea of the mission of the Court over time to do the best it can to see to the implementation of the values and ideals of the Constitution. So if you want a conception of legitimacy I would pretty much sign on to that one. You haven't asked me yet, but I suppose you will now, how I would assess the Constitutional Court's performance through the year . . .

Int Well 2009…

FM I'd say it' was quite strikingly good. I don't know of any outright failures in terms of human rights or constitutional values or of any major blunder in terms of legal legitimacy, institutional security. Popular legitimacy may be still for the future to decide, but I think that the Constitutional Court did not during that time get near the edge of wisdom in that respect. I can recall a session in New York; I think it was about a year and a half ago, at SUNY, at the Law Faculty at SUNY. Justice (Dikgang) Moseneke was here, and he and I jointly held a kind of a session for a gathering of lawyers one evening, and we talked about the *Glenister* ((*Glenister v President of the Republic of South Africa and Others)* case. And I…most of these are US lawyers and I'm explaining the case to them, I say, the Court actually took this case and they decided in favour of Glenister (*Glenister v President of the Republic of South Africa and Others)* and they told Parliament to go back and rewrite the law. And these American lawyers were astounded. Getting involved in…and I explained to them the textual basis, that the Court had explained its action in terms of treaty obligations and section 7 of the Constitution. And my view at the time was, and it still sticks with me, that the Cameron/Moseneke judgment was the one I liked. Then I looked at it more and I thought that maybe Chief Justice (Sandile) Ngcobo had it better. This e-tolling (*National Treasury and Others v Opposition to Urban Tolling Alliance and Others)* case that's coming to the Constitutional Court, and maybe Mazibuko's *(Mazibuko and Others v City of Johannesburg and Others)* case that I have mentioned will be interesting in

terms of the Court's evolving responses to political cases. It seems that the High Courts are almost, sometimes, being besieged by internal party disputes, that are being brought to the Courts to resolve, and that does not strike me as especially healthy either for the courts or the politics of the country – although it does, in a way, signal a fair degree of confidence in the courts.

Int It's also an indication of legitimacy.

FM Well, yes, you could take it as a sign that the Court currently occupies a pretty secure level of legitimacy, but you could also take it as a kind of opportunism on the part of people who can afford to pay lawyers' costs and are just trying to figure out some way to get their way.

Int And then, the final question, Arthur Chaskalson recently passed away, and I wondered whether you could share some memories of your association with Arthur, which spans a long time, 1997 to now recently.

FM I'll tell you my most vivid memory of Arthur (Chaskalson). It was at a gathering. The locale was in Onrus, near Hermanus, the Western Cape seashore. The specific site was a place called Habonim Camp. Camp Habonim is a…I don't know whether it still does service, but used to do service as a Jewish summer camp. It's a summer camp, and so it's a kind of a ramshackle place, there's no luxury there. It's got a big open dining hall with packed earth floors and it's got plain-living dorms and sports fields and so forth. There's an organisation called Students for Law and Social Justice, (SLSJ). And the SLSJ organises every year a Western Cape regional conference in which all the membership are invited to assemble and they invite lawyers, judges, officials to come and give seminars and panels and speeches. And I once had the good fortune to be invited to go and speak at one of those gatherings. And they're quite remarkable, there must have been three or four hundred law students and young lawyers in attendance whom I addressed in a big open shed. Arthur (Chaskalson) has been, I am told, a faithful attendee year after year. It is a two or three day affair, and on the last evening the custom has been to hold an after-dinner session…this was the first of August so it was getting dark early…an after-dinner session around a very large campfire. Hundreds of young people thronging around a campfire to hear speeches. And Arthur (Chaskalson) – this was five years after his retirement from the Court – is the feature attraction. I have other memories of my visit to Camp Habonim, including being chauffeured around by Arthur (Chaskalson), it's the ex Chief Justice of South Africa and he's driving me around from the camp to the place in town, where the people too old to stay in the camp dorms are being housed. But the everlasting memory will be of Arthur (Chaskalson) standing up there in the firelight glow giving an inspirational speech to these young and coming lawyers about the Constitution and its past and its future and its importance and the human

values at stake. Passing on the torch to the next generations. That's…you ask me for a memory, there it is.

Int That's wonderful.

(Track continues for a while regarding the transcript and schedules…)