Steven Budlender Constitutional Court Oral History Project

2"4 February 2012

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This is an interview with Advocate Steven Budlender and itâ\200\231s the 2â\204¢ of February, 2012. Steven thank you so much...

Itâ\200\231s a great pleasure.

...for agreeing to participate in the Constitutional Court Oral History Project. | wondered if you could talk about early childhood memories, where you grew up, a bit about family background, and some of the formative influences that were occurring in the country during your childhood and adulthood?

Sure. | was born in Johannesburg and grew up in Crown Mines, just outside of Johannesburg. | was born in 1978, so | grew up in the late seventies and early eighties. And...shoo, | havenâ\200\231t thought about early childhood for a while, but...1 suppose it was...you know, | grew up in a community of very progressive minded people, obviously all white at that stage. But my parents, that was prior to the divorce, we were living in Crown Mines, and there was a whole street of, | think, young white liberals or progressives, or whatever the appropriate term was, who would go and...there was a veggie co-op and they all had children at about the same time. So there is a...lâ\200\231ve got a series of people who | grew up with, who are friends from that time. And Iâ\200\231ve often thought, the funny thing about it is even growing up in a very progressive family, growing up white in South Africa meant that you were still not exposed to all sorts of things that were happening in the country. You were exposed to news of them but you werenâ\200\231t exposed to the effects of them. So I'll never forget, it must have been in the eighties when there were all those school boycotts and there was some talk about kids not going to school and | could never understand why the kids werenâ\200\231t going to school and why it didnâ\200\231t affect me, because | went to school every day and the schools werenâ\200\231t affected. And yet that was even growing up in this very progressive family where my mother and father were both very actively involved in their employment capacities in all sorts of things that dealt with the political issues of the day, and my mother was involved in educational issues, my father, of course, in legal issues. So it was a very progressive upbringing in one sense and those sorts of issues were constantly debated around the dinner table and they still are. But on the other hand, you know, in retrospect, one did feel growing up white that there were just things that were very different for me compared to other peers.

And growing up in a progressive community and having progressive parents, it seems to me that perhaps your interaction may have been different from some of your peers?

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Yes, no, certainly. And that became very clear when | started going to school and even on to high school. | remember | had a friend over for dinner in high school, so well into the nineties, and he was staggered that we spoke about politics and philosophy and whatever at the table. It was just not done in many households. And so | think there was certainly a very robust level of debate and engagement and you were expected to have views and ask questions and take positions and thatâ\200\231s been the case as long as | can remember.

The decision to pursue a legal trajectory, how did that come about?

Itâ\200\231s strange, | canâ\200\231t remember any moment when | didnâ\200\231t think t hat being a
lawyer was, if not clearly what | was going to do, at least an option. | mean, thereâ\200\231s a story that my father always tells with delight, that when | was very young...| must have been three or four...| said to him | was either going to be a lawyer or a fireman. And he said, well, which do you want to be? And | said, no, | think I'll be a lawyer. And he of course was filled with pride and he said, why? And | said, because firemen have to work very hard. (laughter) And so from a very early stage...I flirted with other things. At one point | thought about being a journalist. At one point at high school | was very into drama, | thought about trying to go into that field. But, law was always on the agenda. It wasnâ\200\231 t
that my father or anyone else pushed it, in fact my mother, | think, very actively tried to make sure that Iâ\200\231d considered other options. It just always f elt
like a fit. | was always interested in it. | used to debate legal issues with my father, you know, just on the way to school in the car, and when | was halfway through high school the Makwanyane (S v Makwanyane and Another) case was argued here (reference to the Court) and he was involved and | came to watch. | took a day off school and | came to watch the Makwanyane (S v Makwanyane and Another) case being argued. So | think | was just always exposed to it, and | was always fascinated by it, so it was never really a time when it didnâ\200\231t happen or wasnâ\200\231t on the agenda.

Growing up during the eighties, in terms of memories, it must have been such a tense time, and | wondered when 1990 arrived, what your memories are of that particular time?

You know, the 1980s was a very tense time, | remember in particular at one point, we spent most of our time living with my stepfather and my mother, and at one point someone who'd been staying with us from overseas had left her address somewhere or something, and the cops had come around and there was real fear that he was about to be arrested. And so we fled the house and stayed with my grandparents and then went out to a farm for the Magaliesburg. And | was too young to understand what was going on but the tension was palpable. And | think when 1990 came around, there was just this sense of it being a new era. | donâ\200\231t think | fully understood the political

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dimensions of the time, but it just felt like an amazing shift. The positive vibe and the feeling of so many people that it was a period that no one had really anticipated at all. Even the most optimistic hadnâ\200\231t really foreseen it. And then of course â\200\23194 with the elections, | wasnâ\200\231t able to vote, but even at our school it was a huge issue, every child had to do a project on the elections and it was something | really felt passionate about. Iâ\200\231ve always been very interested in politics whether locally or internationally, and it was...it felt like a real era of opportunity that was arising.

Steven, in terms of your law studies, where did you go and what was the nature of the law school in terms of both transformation and the types of law you studied?

| started with a Bachelor of Arts in history and politics at Wits. And then went straight on to do an LLB at Wits. And then afterwards did a Masters degree at NYU. In terms of Wits, | mean, Wits, by the time | studied there, was very transformed both racially and gender...on a gender basis, in terms of numbers, and there were many, many black students; they were very actively involved in every aspect of student life and | sat on the Law Students Council and that was really fifty-fifty, white and black. So it was very transformed from that point of view. Thatâ\200\231s not to say that there werenâ\200\231t many issues of tension around whether the law school was doing enough to be progressive, whether it was doing enough in particular to help poor students, and those, | think, are always vexed issues. In terms of the courses | did, again, by the time | got there, things were pretty transformed. | did a course in gender and law, and | did a course in race and the law, there were courses in human rights, and so there were really, if you wanted to, you could very much take more socio-legal courses, rather than the harder law courses. And you had the option to do both. And virtually every student had to work in the law clinic. You could opt to do a research report instead, but virtually no one did. And so students were exposed to the daily problems of people...daily legal problems that people faced.

In terms of Constitutionalism, what was your interest and how did clerking at the Constitutional Court come about? Was it after the LLM or before?

It was before the LLM. What happened was...Iâ\200\231ve always had an interest in constitutional law, | think partly because of my fatherâ\200\231s involvement, but also because Iâ\200\231ve always been interested from the word go about law as social justice. And so Iâ\200\231ve never had a particular affinity or interest in commercial law or intellectual property. Constitutional law just seemed, particularly with the political dimensions that were involved in drafting the Constitution, to just be the most fascinating area. And so...but it was not only that that made me apply to the ConCourt, it was just the opportunity to...you know, Iâ\200\231d known Chief Justice Chaskalson via my parents for a long time and | knew of course of the stature of the judges on the Court, and so it wasnâ\200\231t about the fact that it

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was the Constitutional Court, it was about the incredible nature of the judges and the cases. So it felt like an obvious next step to try and apply. And so | applied to work at the Court and indicated Iâ\200\231d work for any judge, and Chief Justice Chaskalson asked if Iâ\200\231d be prepared to work for him, which of course | said, Iâ\200\231d be delighted. And then in fact it got put on hold because he was approaching his seventieth birthday and there was a question of whether he was going to retire. And so for a while it was all in limbo and there was a prospect that he might retire and | might have to work for some new judge. And | was very disappointed, given who he is and how well | knew him. But in the end it all came through and | worked for him for eighteen months.

| wondered whether you could talk about those eighteen months, in terms of your memories of the time and also your cohort?

Yes. | think those eighteen months were the most incredible, possibly of my life really, because having studied law and constitutional law at Wits, to then be pitched into actually being involved in these cases that were the most interesting cases with the best judges in the country and the best advocates on the most interesting issues, it was just an unparalleled experience. And Iâ\200\231m sure every clerk feels the same, but | feel that | got a fantastic run of cases. | was here for the Treatment Action Campaign (Minister of Health and Other v Treatment Action Campaign and Others) case, both legs. | was here for the United Democratic Movement case on floor-crossing (United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) both legs. | was here for S versus Jordan on prostitution, | was here for the writing of Prince (Prince v President of the Law Society of the Cape of Good Hope and Others) on marijuana. So | just was incredibly lucky with the cases that were here while | was here. And the cohort was interesting. There were very, very different people. There were people like me who were straight out of university, and no real life experience at all. There were other people whoâ\200\231d worked for many years doing different things and were now at the Court. But there were also a vast divergence of political views. | vividly remember, as Iâ\200\231m sure you know, before each case the clerks would sit and have their own mini conference to debate the issues and flesh out ideas. And the Treatment Action Campaign (Minister of Health and Other v Treatment Action Campaign and Others) case was a particularly vigorous debate, with some clerks feeling that it was encroaching on the executive, that the executive needed space, and other clerks feeling that what had gone on was an outrage. | have to say the clerksâ\200\231 debates tended to be less carefully legally honed and more sort of passionate and political than | imagined the judges conferences are. But it did demonstrate that their...although everyone here was very committed to the Constitution, people had very different starting points. And | think that was wonderful because it presented a real opportunity to learn. Iâ\200\231m still friends, very, very close frie nds
with a number of the people | clerked with. Nasreen (Rajab-Budlender) and | clerked with Priti Patel, and weâ\200\231re incredibly close to her. And there are a

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number of other people who Iâ\200\231m friends with or colleagues with, and it was an amazing experience. And | feel | learnt...1 didnâ\200\231t just learn about constitutio nal
law but | learnt about writing and rigour and research. At one point Chief Justice Chaskalson was horrified that | didnâ\200\231t know what Halsburyâ\200\231s was .
Asked what they taught me at Wits and insisted on hauling me into the judgesâ\200\231 conference room and showing me how to look up something in Halsburyâ\200\231s Law of England. Well, it was basic things like that but also big picture philosophical constitutional issues. It was all learnt in those eighteen months. It was an incredible experience.

Youâ\200\231ve known Arthur (Chaskalson) for a very long time, prior to coming to the Constitutional Court, but clerking for him, what was that experience...what are your memories?

It was extremely daunting. Because he is, as Iâ\200\231m sure you know, he is just utterly brilliant, and |...lâ\200\231m quite an engaging person and | like to have the debates, and | think in the time that | was here, the eighteen months...| had the adjoining office to him, so | would often go in and discuss things, or he would come in and discuss things with me, and | think there was one argument that | may have won in the eighteen months, which | regarded as a real victory. But what | most loved about it is he would come through and heâ\200\231d be reading the case, preparing for a hearing and heâ\200\231d come through and say, well, isnâ\200\231t this really just a form of process in aid? And | would now have to understand the question, give an answer, engage in the debate, and the next day | would see counsel struggling with exactly the same question that heâ\200\231d put to me. And it was wonderful to have him test out those questions on me and test his theories and his views. | know different judges have different relationships with their clerks. He predictably was very hands-on in the writing of his own judgments, but we were always, not only welcomed, but required to comment in detail on his drafts, on other judgeâ\200\231s drafts, in order to make an input. And so you felt part of the writing process, and even now the judgments that | Know best, are the judgments that were delivered in that eighteen month period, because you felt utterly engaged with it, and so it was just a wonderful experience.

Steven, | wondered whether you could talk about some of those judgments, the ones that particularly struck you?

Yes. Well, | mean the obvious one is the Treatment Action Campaign (Minister of Health and Other v Treatment Action Campaign and Others) case, | suppose, which was a co-authored judgment but he was very involved in, and | thought what for me was masterful about Treatment Action Campaign (Minister of Health and Other v Treatment Action Campaign and Others)is that although | think most of the judges, probably all of the judges on the Bench, by the end of the case had a pretty clear view that the application had to succeed...the TACâ\200\231s application...there were vastly divergent views on how

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and why and what relief should be granted and what should go into the judgment about the extent of government policy. And miraculously, what you get is a seamless single judgment representing a unanimous view of the Court, and that to me is a tribute to the Courtâ\200\231s processes, but also, | think, particularly to the Chief Justiceâ\200\231s leadership. And | think if that case had resulted in a splintered decision like some of the earlier Court decisions, you know, Du Plessis versus De Klerk , or some of those cases, | think it would have been very damaging. People would have passed the judgments trying to say this judge believes this and that judge believes that, and thatâ\200\231s very damaging. But to be able to say eleven judges of the Court all unanimously feel this, is extraordinary. And of course the legal issues and the base that itâ\200\231s set, Iâ\200\231m sure everyone else has spoken about, but itâ\200\231s a fundamental building block for all of the remaining socio-economic rights jurisprudence. The jurisprudence in relation to housing, the litigation in the Eastern Cape in relation to education, which has been ongoing. TAC (Minister of Health and Other v Treatment Action Campaign and Others) is what sets the benchmark and says socio-economic rights can matter and yet socio-economic rights are never going to entitle the Court to simply substitute their views for what government thinks. So thatâ\200\231s certainly for me | think the most memorable one. The other one Iâ\200\231ve always thought of, and itâ\200\231s a judgment thatâ\200\231s come in for a lot of academic criticism is the United Democratic Movement judgment on floor-crossing (United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae). That for me was quite different. | actually think that case was quite easy. | actually think that for all of the sound and fury about floor crossing and the academic criticism of the Court, actually | think itâ\200\231s hard to find anyone who seriously can articulate a reason for that judgment to be wrong. The Constitution had initially prohibited floor-crossing, then it was amended to allow for floor-crossing, and even now | battle to understand what the real...| understand why politically it was damaging, | understand all of that, but to find the constitutional peg to say it was unconstitutional, when there was a procedurally passed amendment to the Constitution, | must say still mystifies me. And so that was to me an illustration of the Constitutional Court saying, we are not going to get involved in these political debates, we are going to say, letâ\200\231s look at the Constitution and apply it strictly. And | thought that, to have those two cases decided in the course of a year or eighteen months, demonstrated the Court at its best in both respects.

| also wondered in terms of the cases, did you feel that the Court encroached on the executive at all with respect to the TAC(Minister of Health and Other v Treatment Action Campaign and Others)...?

No. | mean, I...| mean, they encroached on the role of the executive to the extent that itâ\200\231s mandated by the Constitution. | know that sounds like a textbook answer, but itâ\200\231s true. You canâ\200\231t...Courts canâ\200\231t assess the constitutionality and lawfulness of government policy without being able to

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pronounce that itâ\200\231s wrong. So weâ\200\231re not in a system where thereâ\200\231s a clear
bright line between the executive and the judiciary. Weâ\200\231re in a system where there are roles reserved for each, but then there is a check and balance from the other roles. So | think those criticisms of the TAC (Minister of Health and Other v Treatment Action Campaign and Others) case are really...theyâ\200\231re naive in some ways, they donâ\200\231t understand the full structure of the Constitution. And | donâ\200\231t think youâ\200\231d find many, if any people today who still
think that that decision was wrong. Both at the legal level, but also even at the practical level. The number of lives that were saved, | think is undisputed. And so although at the time there was all this hysteria in the press and the legal fraternity, | donâ\200\231t think there was ever really any debate.

In terms of the Jordan (S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) case, | wondered, what were some of the difficult issues?

Jordan S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) is a difficult judgment. And | have to say that | think Jordan (S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) is the weakest...probably the weakest judgment that was delivered while | was here. And | say that both the majority and the minority. There were some cases one reads the minority and thinks instinctively, well that must be right. Jordan S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae, | find...you know, after two days of hearing with incredible debate and | think that the issues got obscured and | donâ\200\231t think the Court ever really grappled. It was...1 mean, they tried to grapple, but | donâ\200\231t think they ever really resolved the issues. It was six/five, and it just didnâ\200\231t really get, | think, to
the very difficult issues that were at stake. Itâ\200\231s a very difficult issue of course
and Iâ\200\231m still not sure which way | come out on whether, if | could now write a judgment on it, which way | would come out and whether itâ\200\231s constitutional or not. But the judgment itself | think is unsatisfactory. The majority judgment of Justice(Sandile) Ngcoboâ\200\231s, as it then was, doesnâ\200\231t really grapple with the
issues. But by the same token the minority judgment takes a very narrow reading to come to the conclusion that it does. So | must say, of all the judgments...| donâ\200\231t say the outcome is wrong, but | think the process is a very disappointing one and the reasoning is...it doesnâ\200\231t really get to the heart of the
issues.

Iâ\200\231m wondering, Steven, in terms of your interaction with the other judges, besides Arthur (Chaskalson), what was your interaction with the other judges, and what are your memories of that time?

| was lucky that | got to interact with a number of them and | learnt a huge amount. | got to interact with Johann Kriegler at one point on some issue in relation to the TAC (Minister of Health and Other v Treatment Action

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Campaign and Others) record, and had him at some point berating me for something | had done and it was about the putting together of the record or something quite mundane, that Iâ\200\231ve never put together a record in the same way again, because the lesson was learnt. But in relation to the other judges, | got to interact with a lot of them, and | think what | learnt, which is some ways predictable, but they really had very different perspectives to bear. They were all utterly committed but they had different backgrounds and they had very different approaches, both to the their clerks and the legal issues. And so, you know, | worked with Justice (Richard) Goldstone to some extent when | was at NYU, and Iâ\200\231ve worked with Justice (Kate) Oâ\200\231Regan on a number of things, and itâ\200\231s...they, | suppose like all of us, theyâ\200\231re shaped by their historie s and theyâ\200\231re shaped by their personalities. Thatâ\200\231s why | think itâ\200\231s so miraculous th at the Court manages to deliver so many consensus-based judgments on such difficult issues. Because to get all those people to agree suggests that they really are putting the overall constitutional project first, and | think thatâ\200\231s very important.

Subsequent to your time at the Court, what did you go on to do? | know you went to NYU at some point...

Yes, went to NYU for a year and did a Masters in constitutional law, public interest litigation and antitrust. And then | had six months to kill before | was going to the Bar. And | needed to make some money to pay for pupillage, which is a year of unpaid work. So | went to McKinsey & Company and worked aS a management consultant for six months, which was _ very interesting, incredibly stressful, | think more stressful than anything Iâ\200\231ve ev er done, because | felt utterly out of my depth, and then after that | went to go and do pupillage with Matthew Chaskalson at the Bar. And then began my career as an advocate.

In terms of appearing before the Court, at what point did you begin appearing before the Court?

| was actually incredibly fortunate, my very, very early on, | think | qualified in October, and | think it was by about March or May of the next year, that | had an appearance in the Court. Matthew (Chaskalson) had been offered a case, which he couldnâ\200\231t do, and he said to them, they didnâ\200\231t need a silk...he wasnâ\200\231t a silk at that point, but he told me to take it. He told me the case was a hospital pass and it certainly was. It was a case about the Gauteng Liquor Act and their failure to define properly what the definition of shebeens was (South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others). And the case was a hospital pass in the sense that the state attorney had dropped the ball a series of times and the matter had been postponed. | wonâ\200\231t bore you with the details but the essential issue was about the validity of a law which didnâ\200\231t specify how shebeen was to be defined, and more importantly an issue which Iâ\200\231ve always been interested in, the remedy

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for that. And so | got to argue it, it was my first appearance in the ConCourt, it was extremely nerve-wracking. In some ways I...there were some parts of it that felt very familiar. | appeared and found Justice (Kate) Oâ\200\231Reganâ\200\231s questions very difficult to answer, which was familiar because Iâ\200\231d appeared in front of her once in a moot Court and found exactly the same. But the Court was incredibly warm and all of them, especially Justice (Kate) Oâ\200\231Regan, very sort of welcoming. And, itâ\200\231s strange but | feel much more nervous, even now, appearing in the Supreme Court of Appeal than | do in this Court. Because | think this Court feels in some ways, like home. Itâ\200\231s where | learnt the law and even though none of the judges...or even though very few of the judges are still here who were here when | clerked here, it does feel like a familiar place. And so from that very first moment they gave me a tough time but a warm welcome. It was a wonderful experience and Iâ\200\231ve since then appeared a number of times by myself and as a junior, and thatâ\200\231s always continued.

From your observations, both as a law clerk and subsequently, what do you think are some of the issues that judges grapple with in adjudicating cases?

| think one of the most difficult things that judges have to do is to try and untangle the principled issues from the way that the case has ended up here and the way that the case has been built. And | think thatâ\200\231s very difficult. Because the way that the case has been built obviously affects the facts and the evidence before the Court, but | think that this Court tries very hard, probably harder than any other Court, to separate out those two issues. What is the principle at stake on the one hand, and what are the narrow facts of the present case? And to some extent theyâ\200\231ve been criticised for it, | think, that they sometimes let litigants get away with murder because theyâ\200\231re so committed to deciding the principles. But | think for a highest Court, it can be very dangerous to decide a case on too narrow a basis because itâ\200\231s going to affect the rest of our jurisprudence. And | think, from my experience here, thatâ\200\231s the most difficult thing. And | also think it points to the role of effe ctive
advocates. If you want to build a serious case, youâ\200\231ve got to build it properly from the word go. You canâ\200\231t rescue it at the last minute by smuggling in a constitutional point, and thatâ\200\231s been made clear. And | think thatâ\200\231s on e of the
real difficulties that they face is to unpack that principle versus the narrow facts as they present themselves.

Right. In terms of the cases youâ\200\231ve brought forward, whatâ\200\231s the case th at most
struck you in terms of the approach that was taken in the judgment?

Youâ\200\231re talking about a case that was decided here?

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| suppose the case Iâ\200\231m probably most proud of and that | think demonstrates some of the debates in the Court at the moment, is the case of Centre for Child Law versus Minister of Justice (Centre for Child Law v Minister for Justice and Constitutional Development and Others), which concerned the minimum sentencing provisions of the Criminal Law Amendment Act in respect of children. And | was involved in the case from the word go in conceptualising it, and so thatâ\200\231s why | speak about it. And itâ\200\231s a case which...what interested me about the case was the split in the Court. | always thought the case was a very strong case. It seemed to me that the legislative provisions were directly at odds with the constitutional provisions. Legislative provision saying you must sentence children to jail time unless there are substantial and compelling circumstances dictating otherwise. Constitutional provision saying you must only sentence children to jail time as a matter of last resort. And yet the Court split in the end; they split quite vigorously, | think its seven/four. Now the difference in the majority and the minority was not so much in how often they felt children should be sentenced to jail, that was...they were addendum on that - very rarely, last resort. But the minority felt that the provisions could be read down or interpreted in a way to avoid the constitutional difficulty, whereas the majority felt differently. And | think what it speaks to, as a practitioner, that that is certainly when one tries to assess whether something is constitutional, thatâ\200\231s the biggest difficulty. Ascertainin g
what the Constitution means and requires is, in respect of legislation, is difficult but one can achieve it. Even figuring out what sort of justifiable limitation is doable. But trying to understand the extent to which the Court will be bound by the language of the statute, or whether they will reinterpret it to avoid the constitutional difficulty, is | think the most difficult thing to predict of all. And | think that case demonstrates it. And | think itâ\200\231s about how much doe s
the Court try and fix the problem with reinterpretation, and how much do they fix it by declaring unconstitutional and striking down. And | think that over the last few years thereâ\200\231s been an increasing trend to trying to fix it by means of reinterpretation. But that makes things quite difficult for the lawyers and the parties. And so now, for example, thereâ\200\231s a case thatâ\200\231s coming to the Constitutional Court, the print media case (Centre for Child Law v Minister for Justice and Constitutional Development and Others), which is a challenge to the Films and Publications Act. And when we conceptualised that case, we were very mindful of the fact that the Court might...in our view they create a series inaudible of problems, but the question is, how to remedy them? And so the case was deliberately styled to say, either you must find it unconstitutional or you must fix it at the level of interpretation. But either way, you must fix it. And we felt that was necessary because we didnâ\200\231t want to pick one option and then fall between two stools. Whatâ\200\231s curious is that the government in that case opposed both of them. So it will be interesting to see how the case proceeds. Itâ\200\231s being argued this term in fact. And | think it will be
an interesting one to look at the development of that issue.

In terms of socio-economic rights, the critics have said that the Court hasnâ\200\231t done enough to satisfy socio-economic rights, whatâ\200\231s your take on that?

| think that criticism is really entirely unfounded. | think when you think about the cases long and hard, | donâ\200\231t think anyone would think that Soobramoney (Soobramoney v Minister of Health (Kwa-Zulu-Natal) was wrongly decided. Terrible case, terrible circumstances, but | donâ\200\231t think anyone would say itâ\200\231s wrongly decided. TAC (Minister of Health and Other v Treatment Action Campaign and Others and Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others) speak for themselves, even though the Grootboom remedy you can debate. | think they are landmark building blocks. Similarly in the housing area, thereâ\200\231s been a round of cases where the Courtâ\200\231s taken a very robust approach. So really when we say that the Court...and in a case of like Joseph (Joseph and Others v City of Johannesburg and Others,) which | argued about administrative justice in the context of cut-offs, again, a very robust approach. So really what weâ\200\231re saying when the critics speak about it, they speak about cases like Nokotyana ((Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others) , and they speak about Mazibuko. Nokotyana(Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others) was an appalling case, if | can...| wasnâ\200\231t involved but | can speak freely as a result. The case was poorly conceptualised, it was poorly run, and | think the Court bent over backwards to give them the relief that they sought...to give them any relief, which was to at least force the decision on the upgrade in situ. And | just cannot see that any Court could have found differently in Nokotyana (Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others, in view of the fact. As much as Iâ\200\231ve said about not being constrained by the facts, the facts have to mean something. And the case was very poorly run, and | just canâ\200\231t see that a Court could have done differently. So what are we left with then? Weâ\200\231re left with Mazibuko (Mazibuko and Others v City of Johannesburg and Others). And, you know, people can disagree, but | think Mazibuko (Mazibuko and Others v City of Johannesburg and Others) is a judgment which in time people will...most fair people will regard as correct and many people do regard as correct. | think it was an awkward choice of case, | think it was the wrong plaintiffs, | think it was the wrong issue, | think that the right to water is always going to be a very, very difficult issue, and to choose Mazibuko (Mazibuko and Others v City of Johannesburg and Others), about free basic water and the limits of that, as the first one, as opposed to choosing communities that didnâ\200\231t have access to water at all, | think makes it incredibly difficult. And | think what Mazibuko (Mazibuko and Others v City of Johannesburg and Others) speaks to is that when you are litigating difficult social socio-economic rights, you have to, firstly, work within the Courtâ\200\231s jurisprudence; you canâ\200\231t try and introduce minimum core via the back door. Whether minimum core was a good idea or a bad idea, that idea is dead. So | think thatâ\200\231s the one point. And | think the other point is oneâ\200\231s got to try and take seriously the admonition of the Court that you must begin with the poorest of the poor. And thatâ\200\231s what we tried to do, for example, in the mud schoolsâ\200\231 case, which we ran in the Eastern Cape, which settled and as a result has never got to the Court. And some people involved in Mazibuko (Mazibuko and Others v City of Johannesburg and Others) said, well you could never succeed with mud schools in light of Mazibuko (Mazibuko and Others v City of Johannesburg and Others). | have a

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different view. | think if you conceptualise cases in a way that self-consciously tries to fit them within the Courtâ\200\231s paradigm, | think you can. Who knows what would have happened in mud schools, but | think to suggest that the Court has been soft on socio-economic rights is a nonsense. And | think you will battle to find any serious Court, anywhere else in the world, which has been more committed to socio-economic rights, than this one has. And to expect them to have done more, | think is not being practical. Itâ\200\231s not being realisti c.

Earlier you spoke about principle, and | was interested in the issue between principle and pragmatics, and | wondered what you thought about the fact that... as a judge, you donâ\200\231t operate in a vacuum and you have to consider the social conditions and in South Africa thatâ\200\231s particularly evident. What do you think about that issue of the divide between the principle and pragmatics?

When you say social conditions?

Well, the societal conditions, the context.

Yes. No, look, | think you could never...you can never divorce the principles from the societal conditions. And judgments that are given here have to be routed in our country, and the reality here. They canâ\200\231t be...we canâ\200\231t s lavishly
follow what an American or Canadian or European or any other Court has done. At the same time...and so one has to be pragmatic in that sense. At the same time thereâ\200\231s a danger, | think, of being too pragmatic. | think thereâ\200 \231s a
danger that this Court sometimes looks at the parties and the issues and says, where do the equities lie? And then fails to run a sufficiently principled approach. | donâ\200\231t say it always happens, but | do think it happens sometimes. Sometimes itâ\200\231s worked to my benefit in cases, other times it hasnâ\200\231t. Bu t | think
there is a danger that the Court can be somewhat overly equity based. By the same token, | reiterate, | donâ\200\231t think one can just close oneâ\200\231s eyes to the real
principled issues, or close oneâ\200\231s eyes to the conditions on the ground. The Courtâ\200\231s got to look at the realities. And so itâ\200\231s a very difficult bala nce and |
donâ\200\231tâ\200\231 envy the judges for having to strike it, | really donâ\200\231t.

In terms of the role of the Constitutional Court in a transitional democracy such as South Africa, what do you think are the challenges that remain?

Well, | think the challenges are much the same in some ways that of any Court...of any highest Court in any constitutional democracy. Which is to try and strike a balance between holding government to its constitutional duties and nevertheless trying to avoid becoming the all-powerful body that is perceived or is taking over the role of the legislature. And | think that balance is an impossible one to strike correctly all the time. | donâ\200\231t think thatâ\200 \231s peculiar
to being in a_ transitional democracy, | think thatâ\200\231s the case in respect of al l
countries and we see the debates in the US and the other courts. In respect of

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the transitional democracy | suppose the difficulty is firstly that, you know, we're still a very, very young constitutional democracy with a very young Court. The Court hasnâ\200\231t even existed for twenty years yet, and you think about the range of decisions that have been made in that period, itâ\200\231s just extraordinary. So | think thatâ\200\231s a difficulty. | think also that judging by the public discourse there is a lot of debate about the proper role of the Court, which might be less acute if the Court had been around for a hundred years. But having said that, you see those debates happening in the US on a daily basis, unelected judges and, you know, all the rest. So | think the challenge is for the Court to make sure that it solidifies and maintains its position as a legitimate arbiter of the Constitution, but still that it never flinches from its duty. But as | say, | donâ\200\231t think thatâ\200\231s peculiar to us, | think thatâ\200\231s common to all constitutional democracies.

| also wondered whether you had any fears for the future of the Constitutional Court, and the independence of the judiciary?

| think there were stages where there were fears, particularly in about 2005 when the Bills in relation to amending the Constitution and the Superior Courts Bill were on the table, and they caused a real concern about the independence of the judiciary. | think that that debate having effectively been won by critics of the Bills and by proponents of an independent judiciary, Iâ\200\231m not so concerned about that. | think the judiciary is independent, and | think the structural guarantees for independence will remain in place. | suppose the real difficulty is about a perception that judges might be appointed to Courts who are not sufficiently independent minded. And thatâ\200\231s a different question. Thatâ\200\231s different from the question of structural independence. And thatâ\200\231s very difficult to predict. You know, thereâ\200\231s been lots of criticism of the Judicial Service Commission and | think some of the criticism is unfounded. | think some of it is well founded. But | think if there is a danger to the Courts in general, not the Constitutional Court in particular, but the Courts in general, itâ\200\231s a perception or a fear that people might be appointed because they are not sufficiently independent minded, and | think thatâ\200\231s a real concern. And itâ\200\231s one that needs to be thought through carefully and addressed. By the same token, independent minded doesnâ\200\231t mean against government. And | think those two things are sometimes regarded as synonymous and theyâ\200\231re obviously not. There are many people who are very sensitive to governmentâ\200\231s needs and the need to give government space, who are nevertheless independent minded. And there are many people who are very hostile to government, who | wouldnâ\200\231t regard as independent minded because theyâ\200\231re so hostile that they canâ\200\231t bring an independent mind to bear on anything. So itâ\200\231s a very difficult balance to strike, but | think that if there is a concern in the future, the concern is about who is going to get appointed and what the criteria for appointment are going to be, rather than about the structural independence issue, which | think since the judgment in Van Rooyen (S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) and the beating back of the bills are largely intact.

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Steven, what do you think are some of the failings of the Court and some of its greatest achievements?

| mean, | think amongst its failings is a point Iâ\200\231ve already mentioned, that an occasional tendency to be overly dedicated...overly concerned about equity. And I'll give you a practical example otherwise it sounds very wishy-washy. But | think for example, in freedom of speech cases the Court has tended to be robust in articulating the principles when they like the speech, and much more cautious in articulating the principles when they donâ\200\231t like the speech. Thinking for example of the difference between a case like Laugh it Off on the one hand, where the Court clearly, if they didnâ\200\231t necessarily agree with the speech but they admired it as a cheeky taking down of a commercial brand. By contrast in the Le Roux versus Dey(Le Roux and Others v Dey) case, there were some judges who were just, in the hearing and in the judgment, outright hostile towards speech in that case. And | was in...| should disclose, | was in Le Roux versus Dey (Le Roux and Others v Dey) and we didnâ\200\231t succeed, but | do think, never mind that we didnâ\200\231t succeed, the basis on which we didnâ\200\231t succeed that that case was regarded as defamation, | do think was wrong. And | think it was affected by the view the Court took of the speech in question. Now that can never be right in my view. So | think there is a danger that the Court assesses equities and those sorts of issues to a greater extent, and | think that is a problem. And | think that can sometimes produce a jurisprudence thatâ\200\231s not sufficiently principled. Iâ\200\231ve mentioned alread y the
danger of...well, | didnâ\200\231t call it a danger, but the debate about how far to interpret statutes in accordance with the Constitution. Of course, the principle that one must always, where reasonably possible do so, no one is going to argue with. But the question is what does that mean in practice? And | think sometimes the Court has gone too far in doing so, and thatâ\200\231s produced serious difficulties in relation to what statutes mean and _ into...the interpretation of legislation. So | think those are two difficulties. In terms of the Courtâ\200\231s greatest achievements, | think itâ\200\231s just the fearlessness with which itâ\200\231s
asserted its independence and its duty to uphold the Constitution. You know, you think of the scenarios in which theyâ\200\231ve done it. Cases like TAC (Minister o f
Health and Other v Treatment Action Campaign and Others), cases like the Mohamed case (Mohamed and Another v Republic of South Africa and Others), which is now about to come back before the Court for potential reconsideration in a case coming this term. You think about the range of cases that theyâ\200\231ve done that, but also the skill with which theyâ\200\231ve art iculated
the underlying principles. | mean, Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others), for example, whatever you say about the remedy, is a masterful piece of work in laying down broad principles governing the assessment of reasonableness. And | think theyâ\200\231ve been remarkable in that and | think thatâ\200\231s why their judgments at their best really are magnificent and lay down the guidance. So | think those are probably its strong points from my perspective.

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In terms of some of the broader issues affecting judicial transformation, what are those issues do you think?

You know, | think oneâ\200\231s got to debate what judicial transformation means. At one level judicial transformation means a transformation in terms of race and gender numbers, and one canâ\200\231t undermine the importance of that. | think the fact that the Constitutional Court is now clearly majority black, is very important. | think by the same token the fact that there are only two women is a matter for great regret. So | think at the level of race and gender, | think significant strides have been made. At least in respect of race. | think gender not. Not to the same extent. But transformation to me, | think, does mean something more and | think it means a progressive commitment to the Constitution. Now those are all loaded words themselves. But | do think that it canâ\200\231t be suggested that itâ\200\231s enough to simply put black judges in the C ourt.
What one is looking for is judges who are committed to progressive values, and when one hears in the media bandied about, about revolutionaries and counter-revolutionaries, and the rest, you know, | think what people are looking for are progressive judges. They might not like what they get if they get progressive judges, but one wants judges who are committed to the progressive social project that weâ\200\231ve all committed ourselves to, in the adoption of the Constitution. And | think the difficulty is in trying to find a way of appointing those judges without a fear being that they will sort of undermine government. When in truth the government is committed to precisely the same progressive project. So | think the problem with transformation is less on the racial numbers side and more on trying to produce the judiciary that has the right values and that is in keeping with the Constitution. You know, you appear in front of judges of the High Court, some of which were appointed ages ago, some of which were appointed very, very recently, and you run cases and you hear the approach taken and you think, how on earth is this consistent with what the Constitutional Courtâ\200\231s articulated? And Iâ\200\231ve had that in a rec ent case,
where a judge who happens to be white, adopted an incredibly technical approach, and as a result has denied children and their parents access to social grants, even though the government wasnâ\200\231t opposing, for many months. And you just think, how can that ever be consistent with the Constitution? Now Iâ\200\231m sure he sailed through his interview because heâ\200\231s a
very technically proficient judge, but he was never asked about the Constitution, never in any meaningful way. And thatâ\200\231s to me a real concern.

Steven, do you get a sense that thereâ\200\231s a widening gap, an increasing gap, between the values of the Constitution and the needs of the general public in South Africa?

| donâ\200\231t... donâ\200\231t think so. Iâ\200\231m not sure thereâ\200\231s...Iâ \200\231m not sure thereâ\200\231s any gap
between the values of the Constitution and the needs of South Africa. Maybe the values of the population but thatâ\200\231s a separate issue. | mean, the values of the Constitution are equality, transformation, and in the socio-economic right

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context, that people are entitled to houses and health care and education and water. Those are the needs of the population. So | donâ\200\231t see any widening gap there. People say, well, thereâ\200\231s a disjuncture between the Constitution and the political needs because, for example, of the property clause, but thatâ\200\231s nonsense. The property clause is...the property right is the weakest right in the whole Constitution and it has so many inbuilt checks and balances, that if government wants to say that the property clause is the problem, then what government should be trying to do is pass laws which expropriate or deprive people of their property and have the debate about whether those laws are constitutional. So, certainly on that score, | donâ\200\231t see any divergence between the values of the Constitution and peopleâ\200\231s needs. In relation to the values of the Constitution and peopleâ\200\231s values, that might be slightly different. | donâ\200\231t know that thereâ\200\231s a widening gap, but | think there always has been a divergence, but | think thatâ\200\231s the case with any Constitution. Constitutions are intended to be instruments that contain majority will. If they simply reflected majority values they would do no good at all. And Iâ\200\231m not, you know, persuaded that there is such a disjuncture. Itâ\200\231s true, Iâ\200\231m sure, that if you do a statistical analysis many people would favour the reintroduction of the death penalty or whatever. But, you know, that doesnâ\200\231t mean that the values of the Constitution are out of synch. That means on one issue what the Constitution requires is out of synch with what the majority wants. But so what? Thatâ\200\231s what a Constitution is intended to do and thatâ\200\231s the case in countries around the world. Where | do think itâ\200\231s a concern is not the actual disjuncture between the constitutional values and peopleâ\200\231s values, but the perception that there is a disjuncture. Because, you know, | can sit here and | firmly believe that thereâ\200\231s no real disjuncture between the values underlying the property clause, and the values that motivate land reform and the need for land restitution. | firmly believe that. But if there is a political discourse which suggests that thereâ\200\231s a disjuncture like that, thatâ\200\231s a real problem. If that gets widely received, because then the Constitution and the Courts lose credibility and thatâ\200\231s a serious problem. And thatâ\200\231s why | think government has a particular responsibility not to simply blame the Constitution when it is constrained, but rather to think about trying to pass amendments to acts or trying to bring challenges, or try to have issues litigated, and to do so proficiently. Because otherwise the Constitution and the Court gets a bad name for no cause at all. And because constitutions and Courts depend on their legitimacy that is a problem. Ja.

Steven, youâ\200\231ve pre-empted a lot of my questions, so Iâ\200\231m wondering whether thereâ\200\231s something Iâ\200\231ve neglected to ask you which you'd like included?

| suppose it might just be to say that, | mean, | think one of the advantages of this process is, sort of retrospective or be it personal, look back at the Constitution and at the Constitutional Court judges. But | think thereâ\200\231s a crying need for someone to write the book on the first fifteen or twenty years of the Constitutional Court and the dynamics that have unfolded because | think that there are interesting areas that havenâ\200\231t really been explored about judgesâ\200\231

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voting patterns, and the way they vote together or against each other, and about the way different judges perspectives have shifted, and the approach theyâ\200\231ve taken and why. And although there is some brief statistical analysis of it, no oneâ\200\231s really tried to write the piece analysing it. Now maybe the reason for that is that there are too few constitutional law geeks out there who are interested in those issues. But | think it is important. And | think itâ\200\231s fascinating. And so | hope that at some point someone will write it. | donâ\200\231t think any practising lawyer could ever write it, because one would need to be far too robust and direct to then come and appear in the Court the next day. (laughter) But | think those are the interesting issues that haven't really been touched on in our jurisprudential literature generally. And | think it would mean a somewhat more realist...| donâ\200\231t mean realistic, | mean a realist assessment of the way the Court has operated, which | think would be very, very interesting. And | think it would be very interesting to chart the voting patterns and the voting trends of individual judges, and groups of judges, and the way people vote in concert with each other and then fall out with each other, and | think it would be a very, very interesting thing for someone to do one day.

Sounds fascinating. Thanks so much, Steven.

Thanks very much, Roxsana.