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Nasreen Rajab-Budlender Constitutional Court Oral History Project  
30" January 2012

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This is an interview with Advocate Nasreen Rajab-Budlender, and itâ\200\231s the 30" of January, 2012. Nasreen, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

Sure.

In terms of your pursuing the legal profession, how did that come about? At what point did you decide law is what | really would like to do?

| donâ\200\231t think Iâ\200\231ve ever actually wanted to do anything else. A woman th at | ended up working for when | was at university doing my LLB, was an American lawyer, called Carol Bakey and she remembers a story about me being ten years old and coming to a party at my parentâ\200\231s house, and me going up to her and saying, | want to be a lawyer, what do | do? (/Laughs) So | think that Iâ\200\231ve always wanted to do law, and | did end up working for her and she was an incredible mentor, and taught me all sorts of things. So unfortunately it's a bit boring but (laughter) thatâ\200\231s where | was destined certainly.

Nasreen, in terms of finishing school and entering university, where did you go, what was the nature of the law school, was there transformation in progress at the time you were at law school?

| started off...so my undergrad was at the University of Natal in Durban, and | did a Social Science degree, politics and law basically. And then | moved to UCT for my LLB, and it was a very different experience because universities and their student body were so different. In many ways Natal was much more politicised body of students than UCT was. My UCT law class was fairly white, quite a good mix of men and women, but it was a different experience for me just from an academic point of view because it was a bit more rigorous and smaller class with much more kind of interaction with teachers and lecturers and that sort of thing. So it was a very good experience for me and it in fact prepared me a little bit better for my time in the States, which followed. Which...| went to Columbia Law School after that and that was an incredible experience. | mean, that really blew my mind about how amazing...what sort of lawyers there were out there in the world, because it was a group of

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lawyers from around the world, coming to do a Masters degree basically. So that was an incredible experience, but, ja...

And in terms of transformation at the university, at what point were you at university, whether it was Natal or UCT, and what were some of the transformative projects that were under way?

Well, in Natal | was doing my undergrad, so there were a series of transformation projects but at the time there was...it was 1994, so | think there weren't...it didn't feel at the time to me that there were very uniquely university transformation projects, if that makes sense. That there was a big picture going on in the country and so those were the issues that we were talking about and reading about and kind of discussing. By the time | got to UCT there were some transformation projects, but they really weren't very large in my memory of the place. The things | participated in were really just very law focused, and it may have been that outside of the law school there was a bigger awareness of what was going on in the world and particularly in South Africa, but UCT (University of Cape Town) in many ways was a little island. One felt a little distant from what was going on in the rest of the country.

And then did you go to Columbia immediately after UCT (University of Cape Town)?

No, | did pupillage at the Cape Bar first; it was six months at that point. | did that and did the Bar exam. And then | won a Fulbright scholarship, so | went after my pupillage | went to New York and did a Masters for a year, and | stayed on for another year and | worked at a law firm there, and travelled a bit, and then headed back.

And then at what point did you decide to actually do your law clerkship here... it's known as researchers here.

Yes, | did it when | came back from the States.

So you'd applied from abroad?

Yes, | applied from abroad. When | was coming back, | thought, you know, what is the one thing that | really wanted to do that | hadn't done? And that was clerking at the court. And so | applied at that point, | applied from the US and came back for an interview, and ja, ended up staying.

In terms of the interview at the Court, did you interview with many judges, and how did that process work, what was the nature of the interview?

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Iâ\200\231m trying to remember the details. | came in for an interview with Richard Goldstone and Arthur Chaskalson. | donâ\200\231t think there was anyone else, | think there was just the two of them. And they were both quite interesting interviews. | remember sitting outside, it wasnâ\200\231t in this current Court, it was in the old building, which was sort of a temporary court, it was more of an office block which was quite strange to your notions of what the highest court of the land...what it was going to look like. But | remember a series of people sitting outside waiting for the interviews, and they just all seemed incredibly smart, very bright, and a number of them | now work with and Iâ\200\231m friends with, so we have a long history together. But the interviews themselves, | remember (Richard) Goldstone asking me whether | considered myself privileged or not? And | remember thinking that was quite a difficult question. And | think it was because at the time the Court had a policy that...a lot of the judges had a policy that they would take one privileged clerk, and one underprivileged clerk. And Iâ\200\231m not sure how they define that for themselves, but for me, | think | answered the question by saying that | thought that | had been privileged, that | came from a community that was not privileged. | think the word was advantaged and disadvantaged actually. So that...it was quite an interesting interview, | think it was fairly rigorous. My interview with Arthur Chaskalson was...we talked more about the cases that the Court had had and he was interested in what | was...what about the cases that had come before the Court | was interested in. Then we talked about what | was studying and things like that. But | thought at the time that we sort of had a good rapport that weâ\200\231d got along very well. And so those were my two interviews. And | ended up working for Arthur (Chaskalson)

And the decision to work for Arthur (Chaskalson), was that made by the judges? How did that work?

| think it was made by the judges, | think Arthur (Chaskalson) got first pick of whichever clerks heâ\200\231d interviewed that he wanted. Certainly that is what | was told. And then everyone else decided who they wanted.

And the time that you clerked for Arthur (Chaskalson) was 2001/2002, he was Chief Justice, Iâ\200\231m wondering if you could talk about the nature of working for a Chief Justice and how that might have differed from other law clerks?

Sure. | started...when | interviewed it was sort of, | think, in the middle of the year, and there was a six month period before the official clerkship would start in January. So Arthur (Chaskalson)...! wasnâ\200\231t doing anything at that point, Iâ\200\231d just returned from the US, and Arthur (Chaskalson) said, would | like to come back to Johannesburg earlier and work for him, assisting him with the heads of court for six months and then start my official clerkship? Which is what | did. And that was a fantastic experience because it meant assisting him with his job as the head of the judiciary basically. And the Judicial Service Commission. So I'd go with him to the JSC interviews and help him prepare for them and research candidates and cases and things like that. And sit in on the interviews, which was fascinating for a young lawyer to be able to sit in on

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not just the interviews, but the deliberations on judicial appointments. And Arthur (Chaskalson) was a wonderful mentor actually. He is a fantastic teacher. So I felt like it was an interesting place to be because one learnt about how... I think the job of a Chief Justice largely is a lot of diplomacy, and he managed this court very carefully and very well actually, because it is a court of a number of very different people. It certainly was at that time. And he was very sort of diplomatic in the way he handled issues and tensions, and I think one of his successes as Chief Justice is that he managed to pull this court together at a time that not just our legal system but our country needed a united Court, and he did that very well. So it was fascinating to watch.

Apart from Arthur (Chaskalson), I wondered in terms of the other justices what your interactions were with them and whether any of them maybe had sort of taught you lessons that you took away?

I did, I had a very good relationship with a number of the judges at that time. The judges generally took a keen interest in the clerks, and I think that largely they saw it as part of their role here to nurture young lawyers. In many ways having clerks was a bit of a sacrifice for them. It was also an assistance if you got a clerk who had done something else, was able to assist in the job, but judges spent a lot of time mentoring, and I think that made a fantastic contribution to our profession actually. My relationship with other judges: I got along very well with Zak Yacoob, who was very probing in his questions and often wanted to know what we clerks thought, and would analyse and analyse your responses and that sort of thing. Albie Sachs was wonderful in trying to nurture not just the legal side of you but also other sides, you know, sort of telling you about art and exposing you to that, which was wonderful. But largely they were all terribly approachable. And so I remember them as being a very warm group of mentors.

In terms of your chambers, particular chambers, I wondered who else you clerked with and also what was the sort of reputation your chamber had? Was it sort of a very hard working chamber, very well organised, what were some of the dynamics?

When I started there was two other people, Steven Budlender, and Kallai and myself. so there were three of us. And Kallai and I started around the same time; I think Steven (Budlender) had been there for a little bit already. And it was a very serious chambers, I mean, we felt a lot of responsibility of the Chief Justices office and the clerks and so we did a lot of co-ordinating of the clerks discussions and meetings and that sort of thing. And we had a lot of responsibilities in making sure that the judgments that came out had been properly sight-checked and circulated and that sort of thing. So we took those responsibilities quite seriously. But you know, the clerks really...they were a serious group of people but they're also quite fun. And it was an unusual situation to have a group of kind of very young lawyers coming together and having to discuss the most critical things facing our young democracy at that time. It was an interesting place to be.

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In terms of judgments, what were the key judgments during your time of your clerkship...during your eighteen months, | wondered whether you could talk how that came about as well?

Yes, | served eighteen months largely because the first six months was done on the Judicial Service Commission in helping out with the heads of court. But | was based here at the court, and so | sat in on the normal clerking discussions and processes and things like that, but largely my focus was on the Judicial Service Commission for the first six months. And then after that | focused almost exclusively on court work. There were a number of judgments; | was here for the end of TAC, the Treatment Action Campaign (Minister of Health and Others v Treatment Action Campaign and Others) | was here for UDM (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), which was the floor-crossing case, which was an important case and provoked much debate. And then | was here for a number of cases that were unusual at that point because they actually dealt with sort of non-constitutional issues, and like vicarious liability. Of course there were constitutional issues, though at the time we had to interrogate whether there were. Like Phoebe Apollo (Phoebe Apollo Aviation CC v Minister of Safety and Security) And | was here for the writing of the case about sex workers, Jordan (S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae). So there were some interesting cases...ja...

Did you ever disagree with some of the issues? Did you find that Arthur's (Chaskalson's) thinking may have influenced you and how? What were the jurisprudence issues?

| think Arthur (Chaskalson) influenced all of us. But he...you know, our discussions were very robust in chambers, so we would discuss each case beforehand and we'd prepare memos for Arthur (Chaskalson) on either discrete issues or on the case in general. And then often we'd discuss...he'd

ask us questions that we later heard in court. So it was clearly part of his process of thinking through things that were concerning him about the case. Whether | disagreed with anything in particular, our discussions about Jordan S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae were quite robust, but that wasn't with Arthur (Chaskalson) so much as within the clerks. And | think that the cases like UDM (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) when people had very strong political views, provoked a lot of discussion amongst the clerks. So it was an incredible situation where you had these kind of young lawyers with very nascent kind of ideas of politics and law and justice and where all of that fitted together. And you throw them in a room and ask them to debate these issues that it...it was certainly an interesting place, we

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wouldn't always agree. But at that time, a lot of the clerks had not come straight from university. So a lot of them had either done a Masters degree or had worked for a bit, and that certainly made the discussions more interesting.

And then | also wondered, in terms of the environment, you were at that time in Braampark, what are your recollections and memories of being placed in that particular building, etc?

Braampark was odd, in the sense it was an office complex. So you had people that worked at Nedbank and all sorts of other places, within this office complex. At the same time you had the highest court in the country. It was an odd environment in the sense that it didn't look like a court looks. But certainly

once you were on the ConCourt floor it functioned very much as a court, and once you were there in your office, you know, you forgot the kind of outside building, so to speak. But it was interesting because | remember during the UDM case at lunch time, that | came downstairs, and there was a coffee shop downstairs, called the Barrie Bar, and | came downstairs and there was this huge debate going on in the country and around the Court certainly about this...about floor-crossing, and as | got my tea from the counter, | said to him, do you know it's the UDM case (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) today? And he had absolutely no clue about what it was about. | remember thinking how bizarre that this incredible thing is going on two floors above your head, and here's this coffee house downstairs where life is carrying on as usual.

Interesting. | also wondered, Nasreen, in terms of when you left, what you went on to do, and at what point you then appeared before the Court, how many years was it subsequent to your leaving?

| left at the beginning of 2002, | think...and then | went off to work at Edward Nathan, which is a law firm, and so | worked there for about a year, and at that point...I worked in a public services department, so | did mainly public law. But | realised during that year that | didn't actually want to be at a law firm. And | really wanted to be at the Bar. And I'd done my pupillage already. But making the jump to the Bar is quite a daunting thing because you're effectively starting a new business, so to speak. And I'd done pupillage in Cape Town so | didn't know any attorneys here. But at that point | was already married and we were very much settled in Johannesburg. So, I...ja...with some less than gentle nudging from my father, actually (laughs) | left Edward Nathan and went to the Bar. And | think it was...ja, it was quite a leap but it was the best thing | did, I'm very happy there.

And then appearing before the Court, when did you do that?

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| mean, | had junior briefs before the Court fairly soon after | started the Bar. | canâ\200\231t remember exactly when now, but Iâ\200\231ve had a number of junior briefs . Iâ\200\231ve had one appearance on my own before the Court, which was in a case called Brummer (Brummer v Minister for Social Development and Others), about access to information, and that was a brief appearance because the case turned, as they do, during argument, and | was appearing for one of the amicus curiae, so | had less to say than I'd initially thought.

In terms of the cases that youâ\200\231ve...even if you appeared as junior, what was the case that you'd feel you'd like to discuss and that you think had a huge impact?

| think that they all...Iâ\200\231ve learnt something from every one of those experiences, and in most of those cases | have been junior to a variety of different people and so I've learnt from that process. Iâ\200\231m not sure that thereâ\200\231s any one in particular that stands out for me actually. There have been a number...

What was your experience of appearing before eleven judges on the other side?

It was quite terrifying. | must say, appearing in this Court feels very much like appearing in a place that Iâ\200\231m familiar with. And so that made me comfortable. The only really daunting thing was this Court is a very formidable sort of environment. | donâ\200\231t think itâ\200\231s created to be that way but when youâ\200\231re appearing you stand at a podium in the middle of this kind of room full of people, and the acoustics are not brilliant, so one battles to hear where a question is coming from, and of course from eleven judges, you get them from all around. But really itâ\200\231s a very welcoming place for me, so | like appearing here.

And in terms of your observations of the Court, since your time as a law clerk, what have you noticed in terms of differences over time, and what are some of your concerns about that?

| think it is a different Court to the one that | clerked in. And thatâ\200\231s to be expected because the judges have changed and the clerks have changed, and so the dynamics change, | think. | think when | was a member...when | was one of the clerks, that really it was a time that the Court was focused mainly on creating its jurisprudence. And so there were quite a few judgments of the Court, as opposed to majority and dissenting judgments. And | think that thatâ\200\231s probably changed with...you know, when Arthur (Chaskalson) and (Johann) Kriegler and (Laurie) Ackermann were very serious rigorous kind of lawyers, and they were brilliant people, | mean, to be on this court, | think it was critical that they were there at that time. But | think how this court functions within a greater context and so itâ\200\231s now tasked with looking at where it fits in this democracy, which is itself has all sorts of issues going on. So |

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think their challenges are different. Concerns...Iâ\200\231m not concerned, | think this Court is strong, and | think our democracy is strong and the two...you know, the Court and the executive will get over their little bumps that we currently see, because | think there are bumps, | think there are times when Executive feels threatened by this Court, and by the judiciary as a whole. And thatâ\200\231s the nature of democracy. So Iâ\200\231m not concerned, | think itâ\200\231s a strong Court.

That's good. In terms of the role of the Court, you mentioned the challenges of democracy, what do you think the role of the Constitutional Court is, and what are the challenges that are now prevalent in South African society?

| think the role of the Court is to safeguard our Constitution and to ensure that it remains the primary...whatâ\200\231s the right word...standard by which we judge and test our leaders. So | think itâ\200\231s a critical role. | think that any democracy needs that check. And so this Court, the independence of this Court and the judiciary as a whole is critical...central to our success as a country. And so that, | suppose, is one of our biggest challenges, is being aware of that and being independent. Sorry, what was the rest of the question?

| was just wondering in terms of the challenges that remain, you mentioned the different challenges in society, | wondered what the role of the Court is in relation to the challenges of a transitional democracy?

Well, itâ\200\231s quite hard because the Court is supposed to be independent, you know, so itâ\200\231s not that the Court is an institution that deals directly with individuals, but at the same time its pronouncements affect individual lives. So, you know, | have this clear recollection of one of the cases that... clerked during one of the hearings, one of those cases, the Richtersveld (Alexkor Ltd and Another Richtersveld Community and Others) case, which was...affected a large community of people. And the hearing itself was largely, terribly academic...not academic but it was very theoretical. It was all about legal theory. And some of the top advocates in the country were arguing before the Court and they were questioned very heavily about the theory of what they were doing, and the meaning of the law, and the interpretation of the law, and that sort of thing. But when | came...we broke for lunch, and when | came back into the courtroom at lunchtime to collect something, | saw that there was this massive community of people sitting in the courtroom and praying, and praying for their lawyers. And | remember going back into chambers and saying to Arthur (Chaskalson), this is whatâ\200\231s going on in the courtroom, doesnâ\200\231t this change how you think about things? And he agreed that in fact although we based our judgment on the law, that it always had to be informed by the people behind it, and that we had to be aware of it. Because itâ\200\231s easy sometimes to forget what it is, the individuals behind the cases. So | think...while itâ\200\231s hard, it seems that the Court is completely separate, in fact, what they're doing every day is affecting lives. | donâ\200\231t know that they can do anything more direct than that. The Court in a way has to wait for cases to be brought before it, and so itâ\200\231s at the mercy of interest groups and litigants that

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are able to bring important cases to it. But when it does, | suppose the test is what it does with those cases.

In terms of socio-economic rights, the argument from certain quarters is that the Court hasn't done enough to satisfy socio-economic rights, what's your sense of that criticism?

I'm not sure that it's valid actually. | certainly don't think that this is a conservative court. | mean, when you look at the cases on socio-economic rights, if you think of Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others) and Khoza (Khoza and Others v S) and all of those cases, | think this court made massive strides to protect those rights and to give effect to them and to hold government accountable. TAC (Minister of Health and Other v Treatment Action Campaign and Others) for example. So | think those criticisms are entirely misplaced actually.

| also wondered, Nasreen, it's been said that that first Bench that started was really the glorious bench and they were absolutely formidable and important for the country, and you've alluded to that to some extent, and that subsequently there has been somehow a downward turn, is that a sense that you get? Is that an argument that's prevalent amongst colleagues of yours?

I'm not sure that... | mean, | understand, | think it was a glorious bench, | think that it was composed of some of the leading lawyers in our country. And they certainly were formidable. | think they really were a glorious bench. But I'm not sure that we've had a downgrading. | think what's happened is that we've had judges appointed that have a very different perspective, and that's important. It's quite important that the judges on this Court understand the community that they serve, and that they're a part of it. And one sees that regularly as an advocate in Court, is that it makes a huge difference to see a judge on the Bench who either speaks an African language when your litigants are African, or understands where people are coming from, and can relate. And | think it's a critical factor of justice. So | think the judges that have been appointed are judges that are appropriately appointed. | don't think there's a downgrading by any means, but | think that they have a different focus. And it's something that we do need.

In terms of the issue of pragmatism and principle, how do you understand what judges have to grapple with in relation to that?

| think it's a very difficult thing that they have to do, and | think they largely have to be aware of it constantly during the course of deliberating. But these are a series of individual personalities, you know, and somewhere in between, | suppose, they have to try and draw balance. But it's a difficult decision to make.

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In your estimation what do you think are the greatest achievements of the court and some of its failings?

| think one of the greatest achievements of this court is that at a time that was quite difficult, it set the course. So it really, when one now looks back at the early judgments, they are almost all of them are incredibly long, and you often have numerous decisions of various...agreeing, not dissenting but explaining in detail motivations and understandings and things. And | think that was an important thing to do early on. Because they were starting largely with a clean slate and they had to set the tone for our kind of profession going forward. So | think that was...I think one of the greatest achievements was setting that tone. And those cases about the socio-economic rights cases were critical. One of them, biggest achievements | think was ensuring...when the context of the separation of powers, that part of the role of the Courts is to hold government accountable, and that the Constitution remains supreme. And | think | would say thatâ\200\231s one of their greatest achievements. Failings? | donâ\200\231t know, thatâ\200\231s a difficult question...| think there have been particular judgments that at the time of reading them | thought, | wish it wasnâ\200\231t this conservative, | wish they were kind of less conservative. But they weren't...| donâ\200\231t know that they are failings. | still consider it to be a Court that takes its times with its judgments, that debates, because | know the process the judges work with at this court, that thereâ\200\231s a lot of debate and discussion, and so ultimately when the judgment is produced, it really does reflect the views of eleven judges. Which is a process that not many courts can say they have. So Iâ\200\231m not sure that thereâ\200\231s a particular failing.

When you say conservative, are you perhaps saying cautious?

Ja, | think cautious is probably better. | think thatâ\200\231s right, ja.

| also wondered, clerking for Arthur Chaskalson, whoâ\200\231s considered an intellectual giant, what were some of the lessons you took away, and how do you find that that plays out in terms of your current practice?

| took a lot of lessons from working for Arthur Chaskalson. He has the most brilliant legal mind of anyone Iâ\200\231ve come across, but heâ\200\231s also an incredibly hard worker. So heâ\200\231s diligent. And his preparation for cases was thorough and careful and complete. Which is hard to do. It requires focus and time and kind of attention to detail. So | learnt to do that, and Iâ\200\231m not sure that | always achieve that but | certainly try to in my own preparation for argument, that sort of thing. We very rarely won an argument against Arthur, and that was an incredible learning ground because you can...we all come to this court thinking that youâ\200\231re so smart, and youâ\200\231re faced with this incredible legal mind and it tests you. So | think from Arthur (Chaskalson) Iâ\200\231ve learned to be rigorous and careful. But also he has an incredible humanity, which he never forgot through any of the cases that, you know, itâ\200\231s sometimes quite easy to forget the people behind the cases, what it means. And he never did. And as

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a person to work for he was terribly thoughtful and, ja, very warm, and serious. He was a serious judge but always very approachable and very warm.

Nasreen, youâ\200\231ve pre-empted a lot of my questions. | wondered whether thereâ\200\231s something Iâ\200\231ve neglected to ask you which you'd like to actually include in your oral history interview?

No, | donâ\200\231t think so. | think that my abiding memory of being at this court was that it was a...it really moulded the clerks that were here into the lawyers that they went on to become. And so it was central to my development as a lawyer. And so | donâ\200\231t think that | would be doing...sort of practising the work, doing the work | do now, or running the kind of practice | do now, had | not been at the court. | think it would have been very different. And we formed wonderful friendships here that remain today. And so it was a wonderful experience.

Thank you so much, Nasreen.

Pleasure, thanks.