

Jackie Dugard Constitutional Court Oral History Project

12th January 2012

Int This is an interview with Jackie Dugard and it is the 12th of January 2012. Jackie, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate it.

JD My pleasure.

Int I wondered whether we could start by talking about early childhood in terms of your family background, and also what were some of the formative influences that may have led you down a particular social justice and legal trajectory eventually?

JD I think I was very fortunate to grow up, although in a white South African family, under apartheid, I was extremely lucky in that my parents were political, my father was very involved in critique of the South African government and particularly of the legal order, and very outspoken on those fronts. So I think I grew up in a highly politicised family. I have to say probably to the detriment of my poor brother who, I think, really could not tolerate the fact that every single conversation was political. But I thrived in that atmosphere. And although I ended up at a government, obviously apartheid, primary school, I then ended up, luckily enough, in a private girls' school -well, I say lucky, but there were other problems there in that it was very elitist, and I think that I lost my way a little bit during that time but then I ended going to Wits University in 1989, at a time when the police were on campus almost every week, and student politics as well as obviously South African politics was at its zenith. And I think the combination of my politicised home life and going to Wits University between 1989 and 1992 really solidified a politicised and political trajectory. Although I've never been involved in formal politics.

Int I also wondered, in terms of growing up in a family that was highly politicised, I wondered whether you could talk a bit about the influence your parents may have had on you?

JD Yes, I think my parents had an overwhelming influence, I think not only in a political sense but also a social justice sense - and when I say political I'm really talking political with a small p, because my parents were never members of the ANC or of any political party or movement, but it was politics about justice, that was how I grew up. So it stretched beyond issues of race into absolutely every realm of social justice. So I always grew up with values around social justice, around equity, fairness, in fact I think in some ways it's a curse because I'm preoccupied all the time about unfairness, even in the most petty level, I'm constantly looking for fairness and seeing things as being

unfair where, you know, obviously it's an unfair world. And so I think I did grow up in quite an idealist environment. Very non-materialistic and I think it was always clear to me that I would follow some sort of social justice path.

Int I'm also curious in terms of conscientisation and an awareness of social... injustice in this country, at what point as a child do you think that may have become a cognisant factor for you?

JD I think it was always there. I mean, I think as background noise it was always there, but I can remember specifically when I was at primary school a number of events, which stand out in my mind. One was when Neil Aggett was killed and my father talked about us going to his funeral, and I remember saying in a rather brattish way, "well, who is this guy, I don't even know him, why should I go to his funeral?" And I remember my father saying, "You are going because it's important." And I went. And I remember the experience of that mass funeral and mass mobilisation around the funeral being an incredible, very positive, very, very moving experience. And I still, to this day, I get very emotional about mass gatherings of people, it still carries with it that emotiveness, which speaks to me in some way. And I also remember at primary school, coming up against the teachers a lot. I remember being kicked out of class, specifically with one teacher, who was going on about it being every boy's duty to fight in the apartheid army. And I was arguing with her, and she kicked me out. Along with...I had at least one ally, which was great. And both of us were kicked out. So I remember some key event, which stick out for having been conscientised. But I think it was just always...I think I always also felt like pretty much an outsider. I felt like my parents were different. I felt like my situation was different. I felt different, and so it was always just part of the fabric of who I was.

Int I'm curious about this idea of difference and where you think that may have emerged? Was it just a more familiar line or was it at some point this idea, the value of ideas?

JD I think it was the value of ideas. Actually I think it was both. I think...I think probably, and I've never really interrogated it so much, but I think that if you are a white kid in an apartheid school and your parents are political, and in that school I certainly know of only one other person that was in that same experience with me, I think it does probably, in and of itself, really, really make you feel quite different.

Int I'm also curious about political involvement on behalf of your parents and what your fears were, if any?

JD I don't think I had fears. In fact I think I have somehow always been drawn to danger. I'm often the one who would rush to the front when there were police

causing problems. There is a bit of ...maybe its sensationalism, maybe it's the thrill, I think it's something I've always enjoyed and not feared. I was very aware that my parents were getting threats, that there were bomb threats, that we had, you know, minor nuisances like manure delivered on our lawn, our phones tapped, all sorts of things going on. Some of which I'm sure that my parents were genuinely concerned about, particularly with children, but I never felt fear about it.

Int I'm also curious, Jackie, in terms of the sense of interaction between different race groups, you went to a school that was white, I presume...?

JD At the junior school, ja.

Int I wondered at what point true interaction happened?

JD I think that probably only at senior school, although friends of my parents would come over, but amongst my peers, really only at senior school. And then that was only the few black and Indian kids that had money. And then there was university after that, where there was a more genuine mix.

Int And in terms of your trajectory, at school, did you have a sense intellectually of where you were headed?

JD No. No. I actually never really knew what I wanted to do specifically, until I was about thirty-three.

Int Right....So if we could go back, what made you go to Wits University, what courses did you decide to take, I'm curious about that?

JD I don't remember any discussion about me going to Wits (University of Witwatersrand). I actually think I wanted to go to UCT (University of Cape Town) because I wanted to go away from home and I wanted to live on my own, but my father, as a Wits professor, got Wits for free, so there was no question I would go to Wits. And I did a BA. And the idea was, in my mind, that I was going to do law, so I did what they called then a legal BA, so I thought I was majoring in law and politics. And I did politics because that's what interested me. So I did politics, history, some other BA subjects, and law. Then, in the course of that three-year degree I found law more and more boring and politics more and more interesting. So I decided not to pursue an LLB but instead to do an Honours in African politics. At that point I think I was not thinking about a career, I wasn't thinking about a job, I was thinking about what interested me, and I was very lucky for two reasons. One, my parents have never been sort of outcomes based in that sense. They were always

very encouraging. If this is something that you want to do, if this is something that interests you. Second, money wasn't an issue because of the Wits fees being paid. So I did the Honours degree. And I think after that I then really still had no idea. I always knew I wanted to work in social justice but wasn't sure precisely what job that would entail. Not having a clear idea after my Honours, I spent a year bumming around Europe, working in nightclubs in Greece and ski resorts in France, and bars in London, and then, probably largely because my father was going to Cambridge, I thought, why don't I apply? And so I applied for a Masters in Development Studies. And I did the Masters. And then the honest truth is that I thought it was just the best thing that had ever happened to be able to be at Cambridge, to experience people from all over the world, to live in quite a beautiful lovely cocoon, and so I thought, let me do a PhD. And I did PhD in social and political science.

Int And your PhD was of course, on taxi violence, I wondered whether you could talk a bit about that?

JD I really owe that to Greg Ruiters, who at the time, when I did my Honours, my African Politics Honours, he was at Wits, and when I was trying to think about a topic for my dissertation, he said, why don't you think about taxi wars, this is something that nobody is working on, and the weird thing about taxi wars is that really it's only ever been two of us that have worked on it, Meshack Khoza, as well, and still to this day, although I haven't been working in this field for about ten years, still to this day people come and talk to me about it, and I can't point them to anyone else. So it's this strange, incredibly interesting phenomenon, from every perspective, from a business science perspective, from a social perspective, anthropological, political, economic, and yet nobody takes it up. So I carried on doing that for the Honours, the Masters, and the PhD.

Int And I wondered at what point then you decided to switch to law, and what were the events that transpired?

JD After the PhD I still really didn't know what to do. A friend of mine at the Commonwealth Secretariat sent me an advert, I applied, got the job, and I spent a year and a half at the Commonwealth Secretariat realising there's no way I could ever do that kind of work because it was just overly formal, overly political, with a big P, not wanting to ruffle feathers, softly, softly, and I realised I could not do that kind of work. And that made me think I wanted something harder, something more direct, and I thought, well, law after all, maybe is an in. And law as justice, I must maybe revisit that scene. So I decided to kind of go backwards around the circle and do an LLM in international human rights law at Essex, because someone I know had done that and she had highly recommended it. It was really fantastic and it really made me realise that I did want to get back into law. It also made me realise that ten years in the UK, in an in-between space, was enough, and that I needed to work out where I

wanted to live. I felt that ten years was long enough to be in transition and I thought it's time to go back home.

Int And then you got back here, what was the first position?

JD I actually began applying for jobs in South Africa from London and was offered a job at CALS (Centre for Applied Legal Studies). As it turns out, I had done this huge circle, precisely because I didn't want to explicitly follow in my father's footsteps. And then it just became obvious to me that it was silly to deny something that I really wanted to do, so I took the CALS (Centre for Applied Legal Studies) job and stayed at CALS (Centre for Applied Legal Studies) for six years.

Int Was it at all ever difficult having to get a sense that you had to fill your father's shoes in some way, because he'd started CALS (Centre for Applied Legal Studies) and it really was his inaudible as such?

JD I think it wasn't mainly because he had left CALS (Centre for Applied Legal Studies) in, I think, 1992, and he'd been away from South Africa for a long time. So he had moved on to other struggles. I had also been away for ten years, I came back into a whole different scenario, and I think it really was, it was different people...there still are, obviously, often I encounter people who say, oh, Jackie, you're related to John (Dugard), but I think enough time had lapsed and also the things he works on and the things I work on are different.

Int I'm also curious, CALS (Centre for Applied Legal Studies) and the Legal Resources Centre, had this parallel trajectory and relationship, and they've done different things at different times, and I wondered, when you came on board at CALS (Centre for Applied Legal Studies), it seemed to me that you had taken on cases that perhaps the Legal Resources Centre ought to have?

JD Oh, I don't know about that, I've never seen it that way. I mean, the way that I see the difference, and I genuinely don't know enough about the LRC (Legal Resources Centre) to say it from their perspective, but the way I've always seen it is that the LRC (Legal Resources Centre) works more as a clinic, and so that they're really compelled to take lots more kinds of cases than we ever were. CALS (Centre for Applied Legal Studies) worked as a thematic systemic mover-forward of frontlines. So we could pick and choose more. I don't know how many cases they do a year, let's say, two hundred, whereas we would take four or five cases a year. So it was always a very, very different thing.

Int What I'm curious about is the case that Stuart Wilson and you worked on, was the water case (*Mazibuko and Others v City of Johannesburg and Others*)...?

- JD That was my case
- Int And that's a case that was often felt really it's a public interest case, and it ought to have been done by the Legal Resources Centre, how do you understand that?
- JD I don't understand that at all. I've never heard that said. I've heard lots of people say, it shouldn't have been taken, which is something else that I could talk about. And also of course, the obvious answer, if it were said was, well, it was there for the taking, and we took it.
- Int Sure. Of course..
- JD But it was highly a...thematic, it was a very complicated case, very much routed in social struggles, in politics, it's not the kind of clinic type of a case that I would imagine is easily taken. I'm not saying the LRC (Legal Resources Centre) couldn't have.
- Int Sure.
- JD Of many of the cases that we did at CALS (Centre for Applied Legal Studies), that's the one that really most fitted the CALS (Centre for Applied Legal Studies) paradigm, I think, because it was grounded in social movement mobilisation
- Int So when you came back to CALS (Centre for Applied Legal Studies) what period was this?
- JD January 2004.
- Int 2004. So actually going back to 1990, when transition happened were you at Cambridge at that time?
- JD No, I was at Wits (University of Witwatersrand). So I did my BA and my Honours between '89 and '92.
- Int And I also wondered, in terms of change happening, had you in any way anticipated it through political discussions, etc?
- JD Wow. I mean, I guess it was obvious it was going to happen at some point. I'm not sure whether I thought it would happen exactly when it did.

- Int Right. Did think that it would happen in your lifetime?
- JD Yes, I did.
- Int That's interesting. And what do you think were some of the factors that may have led you to believe that?
- JD Well, I think that the reality is that the time that I went to university '89, by then I think it was clear that already discussions had started to happen, it was already clear that it was going to happen. So...I mean, I suppose it could have still been scuppered, but I entered university and a sort of much more politicised context at a point where it was obvious there was no going back.
- Int I'm also curious in terms of 1994, and the fact that there was going to be a need for a Constitutional Court, at that time, had that interested you, had you been observing things from afar?
- JD No, at that time I was still in the 'not that interested in law' phase. So I actually missed much of the legal reform era. In fact a lot of that political time I missed, and I think, I must say my time in the UK and in Cambridge in particular, was a largely non-political time.
- Int And then when you actually became involved at CALS (Centre for Applied Legal Studies), was that the point at which you really started observing the Constitutional Court?
- JD Yes.
- Int Okay. And I wondered whether you could tell me about your early perceptions of the Court?
- JD When I started working at CALS in January 2004, there had only been a few socio-economic rights cases (I went specifically to work on socio-economic rights, which had been the subject of my dissertation at Essex University). Regarding the Court itself, my initial thoughts were of an incredibly beautiful building, but overwhelmingly, I think, in those first years, I was very upset and preoccupied by the fact that the Court had this open façade but in fact did not allow access. And specifically the direct access issue. I focused on very much in my first years the fact that contrary to other new constitutional and supreme courts, the South African Court had all the legal rules in its favour to allow direct access and yet hardly ever, ever allowed it. And in its first ten years, only in four or five cases, but never ever in that time, to remedy a situation of

a poor person who would otherwise not get access. This was in stark contrast to the Indian Supreme Court, the Colombian Constitutional Court, or the Costa Rican Constitutional Court. So in summary, my thoughts were that the Court was not that creative. It had had all this space, all this opportunity, the most perfect setup architecturally, institutionally and I felt it squandered some of that.

Int What would you attribute this lack of direct access to exactly?

JD I believe that people on the Court were concerned about what people always refer to as the Indian floodgates situation, which describes the situation where the Indian Supreme Court is almost drowning in public interest litigation and direct access cases, and that it actually has an impact because there's a balancing act between an activist court turning around so many judgments that the executive just stops listening to them. I think that the people on the first Court were worried about... about this stampede of litigants directly to them and how that would affect the delicate relationship, the inevitable relationship between the judiciary and the executive. One would have to ask the judges themselves as to why they didn't pursue their direct access mandate – this is something that I'd be extremely interested to have any of those judges answer why they never took direct access cases. Because somewhere between seventeen thousand cases a year that the Costa Rican Constitutional Court hears, and none, there must be something equitable and reasonable. And that's where I feel we've gone wrong. In lurching away from the one extreme we have cut off a potentially important avenue of access to justice, and again that goes to the lack of creativity. Why couldn't we think of something in the middle? Why couldn't we think of fielding, filtering, looking for the really important cases to build the jurisprudence of poor people because this is something that I think the Court is now still struggling with. The Court, I'm afraid, mainly hears elite cases, because poor people just don't get to it. And they have a very low role, only about twenty-five cases a year,, which is an extremely low in terms of Constitutional Courts around the world. The chances of poor people getting onto one of those cases are really vanishingly slim, except in criminal cases when they're brought here through the mechanisms of criminal justice and the support mechanism you've got there through legal aid. You can see this in the fact that there have been very few socio-economic rights cases, and socio-economic rights cases of course a cypher for cases concerning social justice for poor people. Regarding lack of creativity, Theunis Roux has written a good article, which looks at this pro-poor Court, anti-poor outcome. He was looking at the Lands Claim Court and what he suggested is that perhaps amongst new black judges there is an insecurity, which makes them fall back on legal formalism and tradition and on their legal training. And they do not want to be seen to be too woolly, too deviating from the norm, because then they might be criticised by their white peers for not being legally sound. I think there's probably a lot of truth to that. I also do think that genuinely there is a lack of understanding or a discomfort amongst the Constitutional Court judges about how you can use law to

advance social justice and transformation. So I think that, while they are quite comfortable in going against the executive in civil and political rights, and do often, I think they're not very comfortable about using the law as radically as judges do in South America, for example. People might ask: but how can you say this when most of the socio-economic rights cases go in the favour of the applicants (except for two of the socio-economic rights cases). I say that the answer is complex and involves a detailed analysis of the remedies and achievements of the judgments. In my view, the judgments have not been as pro-poor or transformative as they could have been.

Int It's interesting. Theunis Roux talks about the 'Chaskalson Court', and I wondered how you understand that?

JD You know, I can't say and I don't think we've had enough time to really evaluate each of the Chief Justices and their impact. I think it's extremely hard in only fifteen years, and I would not like to comment on particular individuals I don't think one can see discernible trends.

Int It's interesting.....I wondered whether you thought about the first Bench, as having a particular political ideological bent as such?

JD I actually, I'm not sure what that means, if that means sort of a pro-ANC bent?

Int Sure.

JD I think it would be very hard to find in South Africa, a Bench of new judges that wasn't. I mean, as we always say, courts reflect society and new appointments are going to reflect people who came up through the ANC tradition. Of course, some people came up through the PAC (Pan-African Congress) tradition. But broadly speaking I think it's not just the first Court. I mean, any new black judge is likely to have come up in an ANC tradition. And that's to be expected. But simply having come up in a Political tradition doesn't mean that the Court itself is pro-ANC. I don't think there is evidence of that.

Int There has been some argument and probably concern from judges in other courts, about the fact that the first Bench in particular had one particular progressive outlook. And I wondered whether you could, in the context of South Africa and South African history and politics, whether you could talk about whether that was an issue at all for people?

JD Which progressive outlook is that?

Int They had a particular human rights...?

JD Oh, I see. From where I sit, in fact the people that I converse with most of the time, see the contrary. That it was actually limited. I'm obviously aware that there are criticisms of the Court going too far, mostly I find those criticisms are now coming from the executive - a beleaguered Executive that says that the Courts are being anti-transformation in their overruling of particular political cases. But, you know, of course, it's very difficult for the executive to make that claim when it comes to socio-economic rights cases. For me, an extremely interesting aspect because, you know, formally speaking, all of the socio-economic rights cases, or almost all of the Court, all of their judgments, have been pro-transformation at a formal level. So it's very hard for the executive to make such a claim. In fact, myself and my colleague, Kate Tissington, recently wrote, an Op-Ed in the Star in which we basically teased out some of these issues. Certainly when it comes to housing rights you cannot talk about an anti-transformative Court. It's just absolutely incorrect and wrong. But to the extent that anybody in society, right-wing elements, conservative elements, talk about the Court as being too pro-gay, too pro-choice etc, I think one must understand that a decision was taken to live in a constitutional democracy and that that constitutional democratic order is an order that does protect minority rights, but it also has particular trajectories. And some of those are not popular, like for example, the judgment on the death penalty. But at the end of the day, we're living in a constitutional democracy, and I think people, for better or for worse, must understand that that is the context.

Int I'm interested, you've mentioned limits and I wondered whether you see the Constitutional Court as having had limitations?

JD I think the limitations relate to what I was saying earlier - that there are discomforts with the law as transformation. I think judges feel comfortable with law in its traditional role as defending civil and political rights and have been very progressive – for example in the fantastic recent judgment of *F (F v Minister of Safety and Security and Another)* extending the law and vicarious liability in relation to a girl who was raped by a police officer who was off-duty or on stand-by duty, and the Court very progressively, extremely fantastically, developed the law on vicarious liability, holding the ministry responsible. I think that the Court has been very, very good at that kind of thing. What it has not been so good at is being creative and progressive and transformative in terms of socio-economic rights. Specifically, the Court doesn't take poverty seriously in its judgments. It proclaims a lot of nice sounding things in the beginning part of the judgment. It speaks often of the legacy of apartheid, it speaks of disadvantage, it speaks of suffering, but it doesn't operationalize that. So in many judgments that we've been...or cases that we've been involved with, it will trivialise things. I'll give you an example. In the *Joe Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and*

Others) case about evicting poor people in Cape Town, the Court worryingly, calls the relocation of many hundreds of households, forty kilometres away, to an area that is conceded to have no social structure, no services, no transport, no job opportunities, an “inconvenience”. I see this language and the concomitant fact that the judgment allowed the eviction as indicative of a Court that isn’t try to operationalize law as a way to try to overcome poverty, to try and bridge the gap between rich and poor. In my view, the law should be absolutely trying to holistically understand poverty and disadvantage. We should all be trying to use it as not only a shield but a sword, to say, wait a minute, here we’ve got an example of viable community and economic life, there is no way that we can allow a disruption of all of that. That will be putting people in a fundamentally worse off situation, all of their other rights will be compromised, we can’t allow it. And then, in the case that I was most directly involved with, the water rights (*Mazibuko and Others v City of Johannesburg and Others*) case , the Court appeared to completely shirk an oversight role, instead bending over backwards to try to find agreement with the State’s position on every instance. So much so that, in terms of legal interpretation, I can’t find any legal academic who says that the legal interpretation was correct in that case. Ultimately, instead of looking in that (*Mazibuko and Others v City of Johannesburg and Others*) case - at the situation on the ground, that was not disputed on the papers, of multi-dwelling poor (predominantly female-headed) households with no money or jobs and with waterborne sanitation and water disconnecting half way through the month - and saying, surely this must be wrong, what can we do?, the judges instead tried to get into technicalities to move away from the substance of the problem.

Int I’m wondering, from the discourse around what is ‘reasonable’, they’ve now moved to discourse around ‘meaningful engagement’, and I wondered whether you feel that there may be a reluctance in terms of affecting the role of the Executive in any way?

JD I think that it’s not that they’ve abandoned ‘reasonableness’, they’ve just added a new component. So I think that the ‘reasonableness’ is certainly here to stay. And the ‘meaningful engagement’ thing, which came out, first in *PE Municipality (Port Elizabeth Municipality v Various Occupiers)* but then was really concretised in *Olivia Road (Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others)*, is really a way for the Court to try to put the contestation back into the political realm. The problem is - and lots of academics have spoken about the fact that with socio-economic rights cases, maybe that’s the right thing to do; that the Court should really just try and set up a dialogue - that there is no baseline. If the Court wanted to go that way, in my view, they should have first clarified the content of rights. Because you can’t say to poor people, battle it out with the government in discussions – especially after evidently any discussions must have failed in the first place to occasion a resort to litigation - it easily becomes a race to the bottom with the city being by far the

overwhelmingly powerful force, and can easily result in a settlement that violates rights. This could have been avoided, or at least limited, if the Court had set some basic benchmarks, thresholds, some content at all to any of the socio-economic rights. But it has refused point blank to do that.

Int Jackie, in terms of specific cases, for example the *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* case, there's been a discussion that in that case the Court really overstepped the mark. And I wondered how you understand that?

JD No, I don't understand them to be overstepping the mark at all and in fact, on a proper interpretation, I think, of *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*, you can see it's quite a conservative judgment. What they really are doing, is they're saying that an existing policy is discriminatory – from *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* and *Khosa (Khosa and Others v Minister of Social Development and Others)* it is clear that the Court is comfortable where there's an existing policy and where the state is not sticking to the existing policy or is being unreasonably restrictive in its implementation of the policy. In the case of *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*, the Court judged the policy to be unreasonable because it unreasonably excluded almost everybody. So, in a way, it's a negative violations case just like *Khosa (Khosa and Others v Minister of Social Development and Others)*, which was a radical judgment, but they felt comfortable there because it was about a limitation or restriction (the government wasn't providing social security to non-South African permanent residents). I see *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* as being an important judgment, but I don't see it as being such a radical one.

Int The argument has been that...that they've actually told the Executive how to govern. Would you say that that was the case?

JD I wouldn't say that that was the case. One of the judges roles is to tell the State where it's wrong and to uphold the Constitution. So, just like where for example, in the case of prisoners not being allowed to vote (*Minister of Home Affairs v NICRO and Others*), the Court had to say, wait a minute, no, the fact that you're not allowing this is not correct, you have to change that. In a similar way with the *Khosa (Khosa and Others v Minister of Social Development and Others)* case as well, you're not providing for permanent residence, that's wrong, you have to amend it. So your restricting Nevirapine to pilot sites only, that's wrong, you have to amend it. What they didn't to, which I think they should have, is to include a structural interdict and a timeline for reporting back on implementing the judgment.

Int In terms of the *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* case, the outcome was that Mrs Grootboom didn't get her house before she died, and I wondered whether you could talk about that particular judgment?

JD I think there has recently been more of a softening on *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*. Many people are coming to understand that actually *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* was a groundbreaking case, certainly if you look at the operational components of that judgment (which, sadly, the Court seems to have moved away from in subsequent judgments). The Court said in *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, that rights and obligations have to be assessed in the context. In fact, it said the very reason that we are rejecting minimum core content is because we can't say that there's one standard - we will have to assess these in each context. And that is actually a profoundly radical and transformative approach – if only the Court had ever followed through on this in subsequent judgments. Nonetheless, this is precisely the approach we tried to take in in *Mazibuko (Mazibuko and Others v City of Johannesburg and Others)*, where we gave the Court a detailed analysis of the context that people were living in and their water-related needs. Unfortunately, the Court wasn't interested in this kind of contextual analysis. Returning to *Grootboom*, and beyond the jurisprudential perspective we tried to rely on in *Mazibuko*, *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* also had a profound effect on policy. Because of *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, every single municipality in South Africa is now required to have an emergency housing policy. That has saved countless thousands of people from being turfed out onto the streets (assuming municipalities are adhering to the dicta). And, where municipalities aren't complying, litigation has been made easier because now we simply have to say, well, because of *Grootboom* you have to have this policy, you have to adhere to it. Moreover, in terms of an interim order in *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, the people of Wallacedene did get interim shelter and services. They were not left out on a sports field with flapping tents. So, even if Mrs Grootboom died without having a brick house, I think *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* has been a bit harshly judged.

Int I'm also curious from your perspective, what the challenges may be for the Court in adjudicating socio-economic rights' cases?

JD Well, I think the challenges are, first of all, that it's not a traditional area of law. So judges' traditional training will not prepare them for that. Legal training, and

I can attest to this having just recently gone through an LLB, is quite commercially preoccupied and isn't focused on looking at how you can use law as a tool to advance change. So people come through a traditional legal training and then they feel ill equipped to deal with non-traditional subjects or conflicts. In addition, I think there is this racial insecurity thing that Theunis Roux pointed to. New black judges are pitting themselves against the whole weight of a very traditional conservative judiciary, which is slow to change. Many black judges don't want to look like they're going out on a limb: wow, look at that guy, he doesn't know what he's talking about, he's trying some funny stuff, where does he get it from? So I think there's that as well. Additionally, I think that there is the challenge of managing relationships with the executive, and I think that's becoming more and more tricky as the Court comes under increasing fire from the executive. Having said that, I should clarify a point in one of my previous comments, when we were talking about a political Court, and I was talking about it being inevitable that many of the judges would come from an ANC background: I don't think that's an issue and I'm not trying to suggest that any of the judges have ever done anything pro-ANC in a problematic way. I actually think in that regard, I must give the Court credit, I think the whole way along, the judges have actually been extremely good at trying to have a principled approach towards the executive, and I think they have been very good at that. I think that their own limitations when it comes to socio-economic rights are their own and it's not a case of toeing an ANC line; although I do think that, as with all judges, managing relationships with the executive is important. The truth is that if judges were to go further on socio-economic rights, they could not be accused of being anti-transformative. That's the irony, and this is what I wanted to get to, that I think that the Court has sown some of the seeds of its own weaknesses. If it has a weakness it's that it is not popularly endorsed. Poor people don't know about it, they don't care about it, it's not relevant, unlike in many other courts around the world. I was recently at a conference where someone was telling me about the Constitutional Court in Colombia, which apparently comes under fire a lot from the Executive, but the Executive has to be careful about how far they criticise the Court, which has overwhelming popular support, and poor people are constantly standing up for the Court. So, when the Executive makes a statement against the Court, the general population rises up and says, don't criticise our Court – it's our Court. That won't happen in South Africa, because poor people don't often get to the Constitutional Court to have their cases heard - it's not a voice for the poor.

Int And do you think that's directly related to the direct access?

JD It's related to direct access and socio-economic rights. In my view, this Court makes itself vulnerable. First of all, the executive can say, you're being anti-transformation, because all the radical judgments are political judgments on civil and political rights, which seem to be slamming down on the executive in terms of a sort of a perceived liberal agenda. Whereas, it's lost its chance, or it hasn't yet taken up its chance to hold up very transformative radical socio-

economic rights judgments as a counter-balance. So I think judges are unwittingly walking into a self-imposed trap. They're also not positioning themselves for the kind of popular support they could garner. As such, the Court risks becoming very elite and very removed from the lives and circumstances of the majority of people in the country. Inevitably, the fewer poor people you see in front of you in your Court, the more elite you're going to become. You're going to forget about the struggles on the ground, even though you may have experienced those struggles in your own lifetime and even grown up in disadvantage. Interestingly, I think High Courts are more in touch they are seeing these struggles much more, and they're often coming up with much more transformative and radical, and interesting and creative judgments. So even in the socio-economic rights' judgments, you see that in almost every case, the High Court, where it has ruled in their favour, has had a more radical judgment than the Constitutional Court. So, in other words, what I'm saying is the Constitutional Court, is risking becoming a victim of its own attempts to narrow its focus, to control its role, and to not overstep. I fear it's going to be tripped up by its attempts to play that balancing act.

Int I'm also curious whether you think that the judges may have difficulty around the issue of pragmatism and principle in relation to what's happening in society?

JD Ja, I mean, I think it is very difficult to separate those things out, I mean, do you have something in particular in mind?

Int I'm just curious about how they manage that?

JD Ja, I think you do see that schizophrenia in the judgments, I think you do see a judgment that sometimes looks very principled and then pragmatically goes nowhere. Or you see some pragmatic things that seem to conflict with another principle. So I think you're probably right on that, they probably are having a problem with trying to get that right, and I think particularly on socio-economic rights. This could have been avoided had the judges from the outset pursued the route of defining the content of socio-economic rights, then I think then you could have had pragmatism and principle. But I think that without that, you are wafting around in a largely abstract realm where each case floats in and presents itself as a new challenge to the executive. It is likely that in this context, the Court is going to find itself in trapped corners more and more because it hasn't developed a proper way to deal with socio-economic rights' cases. I think it's been much better on the civil and political rights' cases but I can't speak as much about those.

Int I'm also curious, were you ever at any point, enamoured by the Court?

JD No. But I'm not the kind of person that's easily enamoured – my whole persona is about fighting, even if it is about nuance and detail of otherwise good policies that haven't been properly implemented.

Int And I wondered, the first Bench in particular, having people who had strong struggle credentials, people with disability, and also having women, which had not been traditional in the case of South Africa, I wondered whether you thought in any way that that set up a strong sense of hope for that first Bench?

JD I wasn't here during that period and so I can't say that I felt anything directly about the appointments or the hopes. I think that's obviously part of the idea about transformation that Theunis (Roux) has taken up in his article again, and that many people do point to, that whether it's gender or race or any other interest group, simply putting people in positions isn't going to get you the results. And I think that South Africa, as a whole, is screaming evidence that we must harshly interrogate transformation's goals and mechanisms. Clearly, transformation is not bums on seats.

Int ...When you talk about judicial transformation as being more than just demographics, what do you see, the broad parameters for what could happen potentially?

JD Oh, I think genuine transformation must happen, in South Africa but also around the world. In fact, what's going on in the world at the moment is extremely exciting, and South Africa is experiencing a version of that. It's a realisation that one cannot continue with models of economic policy and governance that are premised on inequality. Or not these levels of inequality. That it is not tenable to have such an unequal society. So for me that's what transformation is about, pure and simple. It's about levelling socio-economically, it's about increasing opportunities, reducing income gaps and making sure that we can't go on for one more moment where every single petrol attendant is black, and you just don't have white people in menial labour positions. There are of course black people in management positions, but the real difference is what's going on at the bottom, the fact that whereas unemployment in African males is somewhere around forty percent, in white people it's around five percent. I mean, we can't continue with that. It's untenable, and part of the transformation project is to expose the fact that in such an unequal society, of course you're going to have violence, and of course there's going to be crime. I think many South Africans are blind to the correlation between insecurity and inequality – they would rather simply build a higher wall. But I think increasingly we are going to be faced with the reality that you can't have it both ways, you cannot stick to your very rich lifestyle and expect to live in a society where there is public space, trust, low levels of crime. That society doesn't exist anywhere in the world.

Int In terms of the politics of the country, how do you think that has impacted on the decision-making within the Court?

JD I think that the shift in terms of the (Jacob) Zuma presidency has exacerbated the existing balancing act judges are engaged in – the balance has become more acute and precarious as the executive becomes more defensive and looks for easy targets to criticise such as the courts. As the polity is fracturing, it is turning in on itself and also on critical components of society including the courts and the media. Regarding the latter, there is some truth at the core of the government's tirade against the media – there is of course a mainstream of liberal society that's trying to keep its position, and sees now the fears that they always had, which under (Nelson) Mandela could be allayed, and now things really do seem to be falling apart. Part of that bigger problem is the fact that white society has never had to confront the past. In my view, the fact that they were never held accountable means that we have a generalised problem of unaccountability. One of the consequences of this is that vast swathes of white society will just jump onto a critical stance, oh, this is all shit, it's all crap, etc, etc, and then the government becomes more and more defensive, it's a kind of a warfare that's going on. I suspect that this might not have been so stark had we sat down properly between '91 and '94 and thereafter and made people really, really acknowledge and come to terms with the role that they played and try to get society to grapple collectively with what happened. I don't think the TRC (Truth and Reconciliation Commission) process did that. So coming back to where we are now, I think the ANC is embattled, I think it's in crisis, I think it's under fire on all fronts, and I think that, you know, one of the targets is the judiciary, which it sees as being captured by the liberal faction. I don't think that's true, but I think that there is some truth about liberal capture in other aspects, including the media. So I think that the government has its back up and, from my perspective, judges are going to have to respond in some way. I think it would be naïve to suggest that this cautious Court would just rush in and ignore a new political environment. My view is that one of the ways out for the judiciary is to be more transformative on socio-economic rights. Then, at least the judiciary would have poor people's support and judges could legitimately say that what they're doing isn't liberal or anti-transformative.

Int It's interesting. In light of what you've just said, do you have any concerns about the independence of the judiciary in South Africa?

JD No, I don't. I think actually it's one of the things that we have really managed to hold on to. I mean, not more so than in any country – there's always a degree of politicking by any judiciary in terms of it's balancing act with the executive. But do I think that this South African judiciary is going to bend over backwards always for the ANC? No.

- Int In terms of a transition to democracy and you've alluded to this, and the role of the Constitutional Court, what were the challenges then and what are the challenges that remain?
- JD In terms of law, do you mean?
- Int And socio-economic rights as well.
- JD Sorry, can you just repeat it?
- Int Sure. In terms of the transition to democracy and the role of the Constitutional Court, and the challenges in the country, what were the challenges then and what are the challenges now?
- JD Oh, it's the same challenges, it's how to create a just legal order in a country that is fundamentally unjust, where inequality is pervasive, where it is a highly chauvinistic society, highly sexist, highly racist, and very much dominated by socio-economic inequality. The obvious question is: how can law change such a society and what role can it play in a genuine transformation? Sadly, I think South Africa clearly shows the limits of trying to change society through law.
- Int Do you think that law can be used as instrument of social justice?
- JD I do. I definitely do. This is why Stuart (Wilson) and I established SERI (Socio-Economic Rights Institute). We think that law can be used as a tool for social change, especially where it's taken up by social movements. We believe very strongly that when twinned with social movements, with popular struggles, with community activism, social mobilisation, and legal mobilisation, is a very powerful tool, that then law can be used as one of the tools for change.
- Int I'm also curious in terms of the role of social movement in relation to socio-economic rights' judgments, I wondered how you think that may have impacted on the Court's judgments?
- JD I think basically there have been two...well, actually three...three main socio-economic rights' cases that revolved around a social movement. There was of course first *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*, which they won. Second, there was the *APF* case on water (*Mazibuko*) (*Mazibuko and Others v City of Johannesburg and Others*), which the applicants didn't win. Then the third case is Abahlali's case on the KwaZulu-Natal Slums Act *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others*), which they won.

Abahlali is an interesting social movement because it is a very spiritual and intellectual movement but also very focused on lived environment.

Int In terms of the *Joe Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others)* case, and social movement...why did things go the way they did?

JD I don't know if the communities there would call themselves a social movement per se. I don't know enough about the organisation of the *Joe Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others)* community, their resident's committee. I know that there were some factions and some issues there. I don't know enough about that case to comment on precisely how that panned out. But, you know, as a principle, I think, the idea of grounding cases in social activism, is quite important. It does provide a different plane for the struggle, which is not to say that I don't think that there is value in taking pure legal cases that are simply about one person's electricity that's been disconnected unfairly. I think that has just as much merit. But when you're trying to change the law in a systemic way, it can be very effective to have law play a role within social struggle and not to have law at the forefront in the form of lawyers parachuting into a context. From my experience, the bottom up way is a very important way, and again that's not at all to discount the importance of the just moving in with law in specific cases way.

Int I'm curious, Jackie, in one of your articles you mention the idea of being an activist and an activist judge, do you think that the Constitutional Court Bench, the South African Constitutional Court judges, have had that dilemma, of having to be activists, and being activists and having to then in some ways move away from that activist identity?

JD I assume they must have. I don't know enough and I've never talked to them directly about that. I assume they must have because they were activists. As to whether you can say that the Bench has ever been an activist bench, I don't think so. So they must have resolved it in some way, I guess. Or maybe not, but packed it away.

Int Can you be an activist and a judge?

JD Yes, definitely.

Int How do you understand it?

JD Oh, I think that this is where the Colombian Constitutional Court shows that, where the judges pursue a particular vision of society and the law...Courts' role in advancing transformation, it's possible to adjudicate in that way. It seems to me quite simple. Of course, I'm not a judge, so I don't have to grapple with it too much (*laughs*).

Int I'm also curious whether you think that the South African Constitution is regarded as the most advanced Constitution in the world?

JD Oh, there's no doubt it's regarded as one of them. There have of course been subsequent constitutions, many of which are on a par or even more progressive. But it certainly is one of the most progressive. I'm not one of those people who think that because there are problems and particularly because the judiciary hasn't done what I want it to do, that there's a problem with the Constitution per se - no, I think the Constitution is great.

Int In light of that, do you think that the Constitutional Court has remained true to the Constitution and has satisfied some of the conditions of the Constitution?

JD A lot of what I've been saying is about the fact that I don't think the Court has lived up to the promise of the Constitution in all aspects. It's done extremely, well, in many fields, and I think it's really advanced the law...it's advanced the law a lot in gender, on sexual orientation absolutely. And it's made important advances in terms of customary law, religion etc. It has also made substantial advances in terms of eviction law. So credit must be given where it's due. But are there weaknesses and gaps? Yes, of course. Many of these relate to the positive obligations of socio-economic rights.

Int I've asked you a range of questions, I'm wondering whether there's something I've neglected to ask, which you'd actually like to include in your oral history?

JD No, I think you pretty much covered...

Int Jackie, thank you so much, it was a pleasure to interview you.

JD Thank you...

Interview resumes briefly

Int Jackie, we were talking about the water case (*Mazibuko and Others v City of Johannesburg and Others*) and I wondered whether you could talk about what you've learnt from the water case and the impact?

JD

I learnt a lot, in fact I think I would say that it was really seminal in terms of where I am today, because when I started working on it I was a researcher doing my LLB at Wits while I was working full-time at CALS (Centre for Applied Legal Studies), as a sort of guerrilla lawyer (I give much credit to the previous director of CALS, Cathi Albertyn, who allowed that freedom, and also to the Wits Law Clinic for signing off on all legal papers). And so when there was no attorney at CALS (Centre for Applied Legal Studies) for much of the time that I was involved in the *Mazibuko (Mazibuko and Others v City of Johannesburg and Others)* litigation, I sort of developed myself into a (para-legal) lawyer. But, having come to the case as a researcher, my first entry point was through the social movement, through the community where I was doing social research on electricity and water provision in Soweto. Having become aware of the legal violation, and in the course of the five years that it took to bring that case through the whole judicial hierarchy, I moved much more into the lawyer's role in the course of that case. I went through the highs when we won in the High Court, and the confusion around the strange Supreme Court decision. And then I went through absolute devastation and almost professional death, with the Constitutional Court judgment of October 2009, where I actually felt that that was the end of law for me. I felt there is absolutely no way that I could work within a system that would come up with such a problematic judgment. But really in the course of continuing interaction with our clients, the community, and the social movement we had been working with for all those years, I came to see things in a different light, and in fact, had a sort of an enlightenment around the expanded role of law, law as politics. And the first inkling of that came when I phoned one of our clients, Grace Munyai, from the Constitutional Court, I phoned her in tears and I said, "Grace, I'm really, really sorry, I can't believe it but we lost". As I often recount, there was just a slight pause and Grace said, "I'm so sorry for you Jackie, but did you know I was going to be on TV tonight?" I've always understood Grace to be saying that the legal case and the Court itself, was always a bit removed from the struggle - that was always the lawyers' domain. For the social movement and community, the litigation was just a tactic, and that in fact what it did was achieve what they wanted: to propel their struggle into the mainstream media in a way that it had never been done before, and to politicise the issues. And so Grace's voice was being heard, her struggle was being recognised. On top of that of course, as became apparent in the months after the judgment, the politics had changed. What that exposure had done was make the city aware that there was deep popular resistance to prepayment water meters, and it changed its policies notwithstanding the judgment in its favour. What in fact happened was that the litigation created a platform – a stage – for political expression, which was taken up by the media and shifted attitudes and resulted in additional water being provided and less punitive prepayment meters being installed. So we achieved through that case what we wanted, just not through the court order itself, but through the legal process.

Int Jackie, I just wanted to say, I'm so glad you brought that case forward. I think it's a very important case, absolutely essential.

JD Thank you.

Collection Number: AG3368

CONSTITUTIONAL COURT TRUST ORAL HISTORY PROJECT

PUBLISHER:

Publisher:- **Historical Papers Research Archive**

Location:- **Johannesburg**

©2014

LEGAL NOTICES:

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

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

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

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