

Richard Goldstone Constitutional Court Oral History Project

15th December 2011

Int This is an interview with Justice Richard Goldstone and it's Thursday the 15th of December 2011. Richard, thank you so much for agreeing to participate.

RG It's a pleasure, Roxsana.

Int Thank you. I wondered whether we could start with early formative influences, in terms of where you were born, your family background and certain events that may have influenced the type of legal and social human rights trajectory you took?

RG Well I was born in Boksburg on the 26th of October 1938, and my parents moved to Benoni where my maternal grandparents lived when I was about five or six. And fortunately my mother's father had retired fairly young and in my formative years he was really my major influence. I spent most days with him and when I was young, taught me to type and to play chess and to use libraries and read, and there were no lawyers in our immediate family but he decided I was born to be a lawyer, and if that's what he thought, that was sort of accepted by me, which made my young years very easy because I had no difficult choices to make. I knew I was going to do law so I knew I had to join the debating society at high school, and had to learn Latin, which was then a requirement for an LLB. And so, I was very lucky from that point of view. He came from England, his family lived there for many years. A Jewish family who'd been expelled centuries before from Spain. And he fell out with his family, quite a wealthy family, he came to South Africa, and met my maternal grandmother, who was born in Stellenbosch and

actually went to school in...went to High Dutch. Went to the Rhenish in Stellenbosch, and they met. She was fifteen years younger but the happiest marriage, I think, I've ever seen. And my father's parents came here also as young children. Coincidentally, my father's mother came from England and my father's father was a refugee from Lithuania. So that was sort of my early period. We then moved to Johannesburg when I was ten, in 1948, and I went to Yeoville Boys School from about standard one, and then to King Edwards.

Int In terms of growing up in South Africa at the time you did, at what point did you become aware of the racial disparities...and separate development?

RG Well I really became aware of it, I suppose, in 1948, when I was in preparatory school and the Nationalist Government came into power, and there was a great deal of concern in the community in which I lived. I remember one of the concerns was that everything was going to be in Afrikaans, and so there was a great...and also, coming from a Jewish background, the National Party had a background of anti-Semitism and still in those days its constitution banned Jews from being members of the National Party. So I was aware of that sort of politics, and then during the great constitutional crisis in the fifties, I was in form one at King Edward School, and I remember our form master coming into class one day, shouting, holding his hands above his head and screaming, we won, we won! When the Appellate Division held that the banning of the Cape Coloured vote was unconstitutional. But I didn't really become personally involved politically until I went to university. I'd never...and my parents were always against any form of racial discrimination or religious discrimination, but they were by no means activists in the sense of politics and I never met black people in my parents' home. So it was quite a shock to me going to Wits

University and for the first time meeting black South Africans as peers, as equals. And in my first few days I became friendly with a black student who was in my class, and I learnt first-hand what he had to live every day of his life. How we were equals on campus but the minute he stepped off he had his Pass to worry about, he had to live in a black township; he lived in Soweto. There wasn't a great deal of running water and many homes had no electricity. And that really angered and frustrated me, and I became involved in student politics and very much in the anti-apartheid movement at university. And unexpectedly and in a way unusually, I got elected to the Wits SRC, the Students' Representative Council at the end of my first year, BA. In my second year became vice president. In my third year, president of the SRC. And also in my second year I was elected to the Executive Committee of NUSAS (National Union of South African Students). So it was then very much involved in the anti-university apartheid movement particularly. And I attended monthly meetings of some fourteen something...there were fourteen anti-apartheid organisations that used to meet at Bishop Reeves home in Westcliff. I also enjoyed the privilege at that time of having long conversations with Robert Sobukwe when he was a Professor of languages at Wits. And in particular I remember discussing with him the breakaway at that time of the PAC (Pan African Congress) from the ANC. So that was my sort of university involvement. In 1957, when I was in second year BA, I had the very unusual experience of representing NUSAS (National Union of South African Students) at conferences and various activities in West Africa - Ghana, Nigeria and Sierra Leone. This was very exciting for a young white South African at that time. And it was for the World University Service. It was an International relief organisation and it started with two weeks in Freetown, then workshops and road building in a Ashanti, in the central part of Ghana. And then an international convention, which was held in Ibadan in Nigeria. I think a meaningful subsequent...what became meaningful for me when I was on the

apartheid Bench, was on that trip in 1957, I spent two hours in solitary confinement in a small prison at Monrovia airport. I was booked on Ghana Airways. Ghana was just independent six months in 1957 when I was there. Nigeria and Sierra Leone were still colonies. Rapidly on the way to independence but still British colonies. I was booked on Ghana Airways, which was really run by British,...by BOAC (British Overseas Airways Corporation) in those days, the forerunner of BA (British Airways). And I was booked to fly from Lagos in Nigeria, to Freetown in Sierra Leone, and the flight was overbooked, and they asked me if I'd mind flying Pan American from Lagos to Monrovia in Liberia, waiting two hours and then joining the original flight. Anyway, that sounded quite exciting to an eighteen year old, to be on Pan American. It was my very first trip out of South Africa and I had a lovely flight on Pan American. I remember having three lovely young airhostesses and I was the only passenger on board. And we arrived in Monrovia, I had no visa, South African passport, white skin, and I was immediately arrested, passport was taken away, bags were taken away, and I was put in this small cell at the airport, and I was terrified, absolutely terrified. Because nobody in the world knew I was there. I wasn't due to go there and two hours, to cut a long story short, what seemed like a long story, the two hours really felt like two years. And at one point I asked to see a diplomatic representative and the two armed guards outside my cell found that very amusing. I asked for some water and they said, no, not allowed. And by standing on the bunk I could see onto the apron of the airport, and after two long hours I saw the Ghana Airways flight arrive and my spirits soared. I saw passengers get off. About half an hour later I see passengers get on. Nothing happened. And that was my worst moment. And I can tell you, I would have signed any statement, I would have confessed to any crime, to get out of there. I was absolutely petrified. And then about five excruciating minutes later, they came and took me and put me on board. But I think for a future South African judge, it was quite a good experience of what

people go through, particularly in solitary confinement, and indefinite detention, not knowing if and when you're going to get out.

Int I'm very curious, in terms of when you were part of NUSAS (National Union of South African Students), who were your contemporaries, not just at Wits University, but also at UCT (University of Cape Town)?

RG My contemporary at UCT was Jeffrey Jowell. He joined me on the trip to West Africa. Well my contemporaries at Wits were John Shingler, who was my predecessor as president of the Wits SRC (Student Representative Council) . We were very, very close friends. Later Clive Rosendorff who took over from me who is now Professor of medicine in New York. John Shingler unfortunately passed away some years ago. Michael Kimberley who was, again, a few years ahead. I sort of advisor was Ernie Wentzel, and Ernie (Wentzel) and I were fast friends; he was already married to his first wife, Rosemary, and we were very friendly and got involved in what was quite a cause célèbre in the 'blonde spy'. I don't know if that means anything to you. But we found that there was a Wits student by the name of Priscilla Lefson, a very beautiful girl who was a part-time model. Her closest friend was unofficially engaged to the then president of the Wits SRC (Student Representative Council), Michael Kimberley, and she got drunk one night and confessed that she was in fact a spy for the Security Police and was getting fifteen pounds in those days, for giving information on the SRC (Student Representative Council) to a Sergeant Kruger. And we lured her into Ernie Wentzel's flat in Hillbrow, and I borrowed the tape recorder from the students' visiting lecturers' Trust fund, and Ernie (Wentzel) very adroitly cross examined her, and she admitted on tape that she was a police spy. We took the tape to the editor of the Sunday Times, Joel Mervis, and this was huge, it was the main front-page story, huge headline. John Shingler and I were present at the interview with Ernie

(Wentzel). It was a very traumatic sort of period because Ernie Wentzel made a statement that would embarrass him in respect of the Liberal Party, which he was then quite a senior member, and he didn't want that part of the tape to become public. So it was...the transcript was edited, and that was edited out. And the tape got quote 'lost' unquote, and the Security Police arrested me when I came back from a flight from Cape Town and wanted to know where the tape was. And eventually, really to avoid us being in very serious problems under the then draconian laws, the tape was found in the NUSAS office in Cape Town, slightly spliced. But that was a huge cause celebre. It resulted in the dismissal of the then Commissioner of police, because he denied that there were any spies on any campus and then was forced...and he denied it to Parliament. And he then had to admit he lied, and there's a wonderful cartoon, and I've still got a book of cuttings about this, there's a wonderful cartoon of...he said, that anybody who raised this in Parliament would get a kick in the pants. And the lovely cartoon of him getting a kick in the pants by the leader of the opposition, Harry Lawrence. Helen Suzman was very involved advising us and so forth, but it was quite an experience for a twenty year old. Any statement I made was sort of published in the newspapers, and John Shingler and I were sort of...it was both exciting and frightening.

Int Richard, in terms of your family, how they received your political activism and student activism?

RG Well, my mother was...incidentally she turns a hundred next year in March, still going very strong...my mother was always a strong character and she encouraged me. My father was terrified. And during those student days, for at least two years, I was constantly followed by Security Policemen driving little Volkswagen motorcars. And the effect on me was to make it more exciting. I loved driving at high speed to

give them the slip, and I knew my phone was being tapped and I loved giving all sorts of false information on the telephone. So it heightened the excitement for a young student. My mother sort of took it in her stride, my father was petrified. And he was the only one who was intimidated by it. But generally I didn't have any serious opposition at home.

Int I'm also curious in terms of the law that you were studying, what areas of law interested you? What was the quality of what you were studying? Did it really relate to the society you were living in?

RG Well, you know, I think I took to law almost like a fish to water. I did a BA and I majored in politics and philosophy, and went to law school and sort of, grades took off. But I enjoyed really all branches of law. Strangely enough I enjoyed Roman law, which I wouldn't have thought would be interesting but it was an interesting discipline and made me understand a lot about law, and I think I wouldn't have but for that. I've never really enjoyed criminal law, and did virtually no criminal law at the Bar unless I had to, which meant *pro deo* murder cases and so on, but it wasn't an area I enjoyed. I liked commercial law.

Int In terms of law professors that may have in any way influenced you, not just in terms of the legal work but also in terms of your political activism, were there any on campus?

RG Nobody in particular. I didn't really...I suppose Paul Boberg if I had to choose somebody. I found interesting. I wasn't all that fond of the Dean, who was quote a racist really, Bobby Hahlo. And Ellison Kahn I got more friendly with after I left university. But I didn't really get particularly close to any of my law professors.

Int In terms of the contemporary law students, was there anyone in particular that you continued to have good relationships with? You mentioned Ernie Wentzel...

RG Not really in my class. There were two school friends, Charles Cohen and Robin Pesskin. One of them became an attorney the other didn't do law for very long. But you know, that was really about it.

Int In terms of when you graduated, what did you go on to do? Did you join the Bar immediately?

RG Yes, I always knew I wanted to be an advocate and not an attorney, so I had to spend six months away from legal practice - that was required in those days in those days. I been serving articles of clerkship at Nathan and Friedland. As I had decided to go I didn't have an interest in completing my third year of articles that were then required to be admitted as an attorney. So I spent six months writing some law lectures for Damelin College, and getting married. Noleen and I married a couple of weeks after graduation. And then I went straight to the Bar.

Int Right. And your experiences of the Bar at that time?

RG Well you know, again I loved every day at the Bar. It's a very strange occupation because it's very insecure, having to rely on getting briefs from attorneys and you didn't know who they were coming from, and if they were going to come. But work came in pretty rapidly, and as I say, it was mainly commercial work. Johann Kriegler, in fact, was my next-door neighbour at the Bar and he and I had a strange history, some of it we didn't know about. But his mother's parents farmed in Heidelberg

next to my father's parents. And when my grandparents moved to Boksburg, Johann's (Kriegler's) parents happened to be their neighbours. So they're neighbours on both sides. And Johann (Kriegler) also went to King Edward School, and I ended up, as I say, being his neighbour at the Bar. And in my first year at the Bar, he was secretary of the Bar Council. Johann (Kriegler) must be six years older than me, I would guess. But he used to come into my chambers when I wasn't there, and simply fill in, in my diary, when I was doing *pro deo* murder cases. So I did more than my fair share because of Johann Kriegler.

Int At some point you were appointed to the Bench and I wondered whether you could talk about that given that this was an interesting period historically in this country?

RG Well, you know, the last thing I expected was to be offered an acting appointment on the Bench when I was thirty-eight. I only took silk when I was thirty-six, and out of the blue the Judge President then, Wes Boshoff, asked me to come and see him and he said he'd like me to take a short acting appointment on the Bench for six weeks, and that wasn't such a difficult decision. And I enjoyed being a judge and that was followed by another appointment, after a break of about three months, for six months. And then again, out of the blue, I was offered a permanent appointment. And that was a very difficult decision. It was difficult politically because one was really at the coalface of implementing apartheid laws. And also it was very difficult economically. My wife was a full participant and a full partner in that decision because it meant a drop in income of three or four hundred percent. I was earning a lot of money as an advocate, and judges' salaries in those days were abysmally low. So it was a financial sacrifice and a political step into a sort of new world. And what made

the difference was in fact the Legal Resources Centre, and Lawyers for Human Rights. I was friendly with Arthur Chaskalson, as I mentioned, Ernie Wentzel, and I obviously consulted with them, and Arthur's (Chaskalson's) attitude, I'm not sure he said so expressly, was that he wouldn't have found it acceptable to be on the Bench, but he wouldn't at all be critical if I didn't...he would encourage me if I'm prepared to, because they wanted sympathetic judges on the Bench – talking about the Legal Resources Centre – rather than the reverse. And after much heart searching and indecision, I decided I would do it. And I'm happy to say, I've never looked back.

Int I wondered what it meant in terms of operating within a system that was legally oppressive, and having to hand down judgments that had to fit in with that, I wondered how you negotiated that?

RG Well, you know, it didn't. I can honestly say, there was no case where I really was forced to hand down a judgment or concur in a judgment that went against my moral or political convictions. There are a number of reasons for that. Firstly, the apartheid laws were applied in the Magistrate's Courts and there were no appeals on Pass offences and all this sort of thing. And the appeals that did come, I was able to find ways of ameliorating the law. *Govender's (S v Govender)* the sort of well known, often quoted example on the Group Areas Act, but there were other cases. In fact, I was reminded of one that I'd really forgotten about, just a couple of months ago at an international Bar meeting in Dubai, I found myself sitting at dinner with a group of eight South Africans, all black South African lawyers, and one of them reminded me of a decision, which he said, he will never forget, when I castigated magistrates for referring to black witnesses and accused as "witness" or as "accused". Not "Mr so and so". And the reason that...and they would never do that with whites, it was always "Mr Smith", but it was

“accused” in the case of black persons. and I wrote a judgment to the effect that this was demeaning of the courts and brought the courts into disrepute and that all people should be respected. Incidentally the prosecutors at that time didn’t do that. The state prosecutors addressed people appropriately but the magistrates didn’t. That was the end of that practice, but it’s amazing, sort of thirty something years later he recalled that I was responsible for that. So there were many, many cases where...and you know, my role model, let me say, I should have added earlier, but I don’t think I would have taken an appointment but for the example of John (John) Didcott. John Didcott (John) again, six/seven years older than me, former President of NUSAS (National Union of South African Students), we didn’t know each other well, I had a case against him at one stage when I was a junior and he was a silk at the Durban Bar, but John Didcott took an appointment on the Bench some five or six years before I did and gave some wonderful judgments, ameliorating some of the worst of apartheid laws, and I think that model meant a great deal to me.

Int I’m also wondering, at some point you were appointed to a Commission of Inquiry, which has now become known as the Goldstone Commission, and I wondered whether you could talk about that?

RG Well, it was really...it was preceded, importantly, by two other commissions. The one was really an inquest into the death in police cells of Clayton Sithole. He was the partner of Zinzi Mandela, and the father of their child. And a week after (Nelson) Madiba was released from prison, Clayton Sithole was found hanging dead in John Vorster Square cell. There were allegations, particularly from the ANC, that he was murdered, and you can imagine that it was quite a big thing, and I was asked by the then Minister of Justice to constitute a one person judicial inquiry into the death. And it was absolutely clear that he had

committed suicide, and that the most probable reason was, that he gave very damaging evidence about Winnie Mandela, about the soccer club, about arms, and so forth, and the evidence pointed to his having committed suicide out of remorse. I remember what was important in that was with the consent of all counsel involved, I didn't disclose any of the statements he'd made, implicating Winnie Mandela, because she wasn't a party, and it seemed to me to be unfair to make public statements against her that were really hearsay, that she hadn't had an opportunity of dealing with. Then a few months later, there was the terrible massacre at Sebokeng, when a police line faced sixty thousand black protesters marching on Vereeniging, and they opened fire for no good reason, killing dozens and injuring hundreds. And again, I was appointed by the government to investigate that, and found that the police had acted criminally and should be charged with murder and culpable homicide. It ended with the government paying many millions of rands in damages. They were criminally charged but the trial was abandoned because of the Truth and Reconciliation Commission. Those two, I think, led directly to my being approached to head the so-called Goldstone Commission, which began just before...in October 1991, and lasted until our first democratic elections in April '94.

Int In terms of the Commission of Inquiry, I wondered whether you could talk about that in terms of the process and main findings?

RG Well, it was a very difficult brief, really, because the...unexpectedly violence had broken out during the negotiating process, and much of the surprise of all South Africans there was these huge numbers, some ten thousand people plus, were murdered for political reasons. And it was really because of the relationship, or bad blood, between Inkatha and the ANC at that time. And President...well then, Mr (Nelson) Mandela, Madiba, said that the reason was that it was being fomented

by elements in the Security Police and the army. That was hotly denied by President (F.W.) De Klerk. And the murders went on. (F.W.) De Klerk then suggested to CODESA, as it then was, to all the, I think, nineteen parties, to the Constitution making process, suggested a Judicial Commission of Inquiry into the causes of the violence and political intimidation. The leaders of the black, or predominantly black parties, and particularly Madiba (Nelson Mandela), said they thought it was a good idea, but only if the chairmen and four other members were chosen unanimously by all of the parties to the Peace Accord. (F.W.) De Klerk had little option but to accept that. And after two months of haggling I was then approached by the then Minister of Justice, Kobie Coetzee, and told that I had been unanimously chosen. I wasn't that keen on doing it, quite frankly, because it seemed mission impossible. And I said I wanted twenty-four hours to think about it. And I went back to him with three conditions. Condition one, was that I had Johan du Toit, JJ du Toit, who was my right hand person in the Sebokeng Inquiry, a very, very good tactician and very good investigator. I said I want him as my sort of right hand person. And Kobie Coetzee said, that's no problem, he said, we both come from Bloemfontein. So the second condition, was that I did it not full-time, but continued in the Appellate Division; I was then in the AD (Appellate Division). I didn't want to be...I wanted to retain my independence and not to, in any way, inhibit my being a judge in the Appellate Division. And he thought I was crazy, but he said, if that's what you want, fine. And I said, the other side of that, I'm not prepared to accept a penny payment for doing it. I'll get my judges' salary and go on doing my judges' work. And the third condition, I said, if I have to be away from home for more than twenty-four hours, then my wife comes with me at state expense. So those conditions were agreed. And, in fact, I recall very well, the first meeting ever of the Commission fell on my birthday on the 26th of October of 1991. I didn't know the other four members of the Commission, hardly at all. But we really melded together. There were

four of us, two black, two white, all lawyers, and we held over forty inquiries during that period. Arthur Chaskalson played a crucial role towards the end. I suggested that he should sit with the then Attorney General of the Transvaal, Jan d'Oliviera. They were really to advise what would happen with the evidence after the first election. And most importantly, I had huge powers of subpoena and also search and seizure, without any court order, and that led...it's a long story, which I've written about...but it led to the raid on military intelligence, where we seized files which proved conclusively that Madiba's (Nelson Mandela's) theory was correct. That the army, military intelligence was in fact fomenting the violence, giving guns to Inkatha, were involved in some terrible, terrible incidents. And of course the other important event during the Commission...the other important events, I think, were the assassination of Chris Hani and the massacre in Boipatong.

Int I'm also curious, in terms of Boipatong, did you ever meet with criticism about the way you handled the Commission of Inquiry...?

RG No, I don't think so. You know, the events really took over. Again Arthur Chaskalson was very much involved. He was counsel for the victims. I called to sit with me, the former Chief Justice of India, Praful Bhagwati, and we agreed unanimously on absolutely everything we did. And it may or may not be a good thing or a bad thing that there was no decision, no report was ever found on the Boipatong Inquiry, again because of the Truth and Reconciliation Commission.

Int At some point you were nominated for the Constitutional Court, I'm curious about that process and how that came about?

RG Well, the first thing I knew about it, was a phone call from the then Minister of Justice, Dullah Omar, who said that the government had

decided that I should be one of the four existing judges. You know the background?

Int Yes, the sitting judges...

RG One of the four existing judges. And obviously I was delighted, I mean, that's the greatest thing that could ever happen to one in one's dreams to be on one's country's first Constitutional Court. And obviously I was absolutely thrilled about that. Arthur (Chaskalson) had already been nominated...had already been appointed as the President of the Constitutional Court. Then the other four of us were approached. But within less than a week of that invitation and acceptance, I received the invitation to become the Chief Prosecutor of the War Crimes Tribunal for the former Yugoslavia. And it came in a faxed message from the first president of the court, Nino Cassese, a great Italian international lawyer who died only a couple of months ago, asking whether I'd be prepared to become the first prosecutor. And I really wasn't interested. And I'd never prosecuted, I knew nothing about international humanitarian law, and I knew next to nothing about the former Yugoslavia. So I was really the wrong person for that job, and I was on the point of sending off a fax politely declining, when my phone rang and it was the President. And President Mandela said, "I believe you've been invited to be the Chief Prosecutor". And I said, "yes, Mr President", and I said, "I'm about to decline the invitation", and I gave him my reason. He said, "Well, not so fast", he said, "I think you should do it". He said, "in fact I've already told the Secretary-General that you would do it". And so that really left me with little option. My wife was pushing me to accept it incidentally for different reasons. We were under very heavy security at that time, I'd been under heavy death threats during my Commission, and we had twenty-four a day, I wasn't allowed out without armed guards. And she...you know, this is really a

terribly inhibiting process and not pleasant. And my wife, Noleen (Goldstone) thought it would be a good idea to get out of the country for a couple of years. I didn't think it was a good idea, but you know, I certainly don't know anybody who could refuse any request from Madiba (Nelson Mandela), and certainly I couldn't, so it ended up...and...oh, but I said to him, but what about the Constitutional Court? And he said, don't worry, the minister will explain. And I spoke to Dullah Omar and he said that the Cabinet had decided that I should accept the invitation from the United Nations, because it was the first offer of any important position to a South African after our democracy, and Madiba (Nelson Mandela) particularly felt that we owed a lot to the United Nations for its support for the anti-apartheid campaign, and during the whole negotiating period. And Dullah Omar said to me that the Cabinet had decided to amend the Constitution to allow me to take leave of absence, not for the four-year period but for the two years. And they also had to amend the Constitution to allow for a quorum. They forgot about it in the original draft of the Interim Constitution, and they amended it to provide for a quorum of eight. And they said that my seat would be kept warm. There would be an acting judge in my place, and it was Sydney Kentridge for most of it, and I would then come back to the Court. So I really had it both ways. Some people were critical, I think, of the government, for appointing me and letting me miss, what effectively was eighteen months, because the Court didn't start until February of the following year, and this was June/July of 1994.

Int So in effect you really missed the first eighteen months of the beginning of the Court?

RG That's correct. I remember flying back for the Inauguration.

Int What are your memories of that?

RG Well I remember as if it was yesterday. I remember with President Mandela sitting in the middle, flanked by twelve judges, because Sydney Kentridge had been appointed in my place, and I remember the diversity being manifest in the way people took their oaths. Have you interviewed Albie Sachs? Did he tell you about his taking the oath?

Int No, I don't think so, I'm still interviewing Albie (Sachs).

RG Because it was interesting. Albie (Sachs) was well known to be agnostic, if not an atheist. And he insisted on taking the oath. And I don't think there's any secret about it, he wanted the drama of raising the stump of his arm, which he wouldn't have done if he hadn't taken the oath. And Sydney Kentridge, who was sort of moderately agnostic, didn't take an oath. And what was interesting were the languages; everybody took the oath in their mother tongue. Johann Kriegler, who is absolutely bilingual, took half the oath in English, and half the oath in Afrikaans. But it was a very dramatic experience, and of course Madiba's (Nelson Mandela) opening words are seared in my memory, where he said something to the effect that the last time he sat in a court, was to hear whether he would be sentenced to death. And of course the next day there was the very first case on the constitutionality of the death sentence (*S v Makwanyane and Another*). But I was only here for that day and went back the next day to The Hague. And I flew back...I took two weeks' leave for the Constitutional...for the whole certification (*Certification of the Constitution of the Republic of South Africa*), again, because Madiba (Nelson Mandela) felt that that should be heard...because of its crucial importance, should be heard by the Court as properly constituted. And we arranged with the UN that I would be released in order to do that.

Int So the point at which you did come back fully; I wondered whether we could focus on that period. So that would have been probably 1996, would that be correct?

RG That would have been '96, yes.

Int I wondered coming back, when you came back, had you in some ways found it difficult to fit in because it had been a new Court...?

RG You know, not at all. In fact, Albie Sachs always said to me on a few occasions, that he was amazed how I came back and it was as if I hadn't ever missed any period.

Int In terms of the processes of institution building at that point, what were you involved in?

RG Well, you know, I was very much involved, as we all were, at the first meeting...let me go back, I think it's important to talk...you know the first time the original eleven justices met, wasn't in South Africa. Have you been told that?

Int Was this in Germany?

RG In Germany, in Karlsruhe. And the reason for that was the then German ambassador, with whom I was very friendly, Christian Ueberschaer, a very senior German diplomat, saw the connection between the German Constitutional Court and the South African Constitutional Court, one, because of post Nazi period, the other post apartheid. And he suggested to the then president of the German Constitutional Court, Jutta Limbach, that it would be a wonderful idea if

she would invite the first eleven justices to have a week's seminar with the whole court in Karlsruhe, to discuss issues that both sets of judges thought might be of use to the South African justices in the Court. So that was the very first time. It was easy for me, I went by train from The Hague to Karlsruhe. I think knew all of the judges except Tholie Madala, but it was, as I say, it was the very first time and must be unique that the first time the Court met was many thousands of miles and on a different continent. And then I also came back for the first meeting of the Court when we decided on nitty-gritty things, what we would wear, how we would be addressed, the height of the Bench, and all of those...the robes. And we agreed that Yvonne Mokgoro would go off and design robes for the Court. Probably a bit sexist to ask one of the two women to do that. But, I was involved in that and obviously kept very much in touch with what was going on because I knew I was coming back to the Court.

Int ...You spoke about the first meeting, much has been said about the diversity and background. Sydney Kentridge, of course, has commented on the diverse Bench. And I wondered having been on the Bench, and being a sitting judge, and being appointed, you'd known some of your colleagues, how did you then find this diversity, how did it work? Because much has been said about the collegiality...

RG Well, you know, it was a collegial Bench from the beginning. It didn't particularly strike me. What's always been striking for me, and I don't know whether this is idiosyncratic or not, but every single day I spent on the Constitutional Court the colour or background of people meant absolutely nothing. We addressed issues, I think, with integrity and openly. And the importance of diversity was the input from people, in some cases more than others. Obviously in cases dealing with customary law, the black judges, especially those who had

been...who'd grown up in it, was of tremendous importance. But I wouldn't exaggerate it, I think it's important, I think the diversity is important, but in many ways I think it's more important from the point of the public face of the Court than from the internal workings of the Court. Because we all came from the same sort of human rights corner, so there was never any fundamental difference of approach between the eleven members of the Court.

Int It's interesting you say that, in terms of coming from the same background. That of course has been criticised in that it doesn't really reflect the societal differences, and I wondered whether you felt that was ever an issue?

RG Not at all, I think it's inconceivable that it wouldn't be. Here we had a new Constitution with a Bill of Rights. On what basis do lawyers be appointed if they don't fully subscribe to every word in the Bill of Rights? So it would be unthinkable, I think, at that time, and I hope still today. You have to take an oath of allegiance to the Constitution. How can you do that if one doesn't believe in fundamental human rights, which are enshrined in the Bill of Rights?

Int Richard when you came back in '96, what were some of the processes you were involved in, in terms of the committees were you involved...?

RG Right. Well, I think a major contribution I made...well, there were possibly two. The first one that disturbed me were reports I was getting, and there were articles you can find in the Mail & Guardian and elsewhere, that two of the judges were particularly rude to counsel in Court. And counsel really, some of them hated appearing in the Constitutional Court. And I found that objectionable. I know Sydney Kentridge found it objectionable and tried to do something about it. I

made an issue of that and said I wasn't prepared to remain silent if colleagues were not polite and respectful to counsel. And I think that helped.

Int Did you find that that was indeed the case?

RG Oh, yes, absolutely. On a couple of occasions, I was embarrassed at the way counsel were spoken to. And that changed, and it changed quite quickly and for the better. I think it was possibly easier for somebody coming from the outside to raise it. And the second change that I was responsible for, was the manner...I'm sure you know how judgments are read through? I was responsible for that. There was no reading through before I came back. And some of the judges were unhappy at getting corrections from one judge or another judge, to their style or their grammar, and so on. And some of them felt that it was...took it a little bit personally. And I said, you know, in the Appellate Division we had a system of reading through, and we sat in panels of five, that anybody who wrote a judgment would have it read through page by page by all five and the other four would give their input. Judge Nicholas, was one of the judges. He was an English teacher originally and his criticisms certainly improved my writing and language skills. And I said, nobody took it personally because everybody was treated the same way. Everybody was pulled to pieces. And I discussed it with Arthur (Chaskalson) and some of the other colleagues, and they said, well, let's give that a try. And that began the read through, and it really resolved that problem. Because everybody was treated in the same way and it's quite an experience to have your judgment criticised by ten people, you know, page by page. And when Zak Yacoob joined the Court, page by page, would change to paragraph by paragraph, because he deals in paragraphs. And the committees too, I think Albie (Sachs) and I were responsible for setting

up a media committee. He was a bit of a lone voice until I came. I've always had a soft spot for the media. I like journalists, I enjoy journalists, and we were responsible for slowly getting the television cameras...you know that story?

Int Yes. I'd like to hear it from you...

RG Well, you know, the majority of the justices were against having television in Court. The strongest objector was Laurie Ackermann, he was absolutely opposed to it. And I could see no reason why there shouldn't be cameras in a final Court of Appeal. There were no witnesses. I'm very much against cameras in a trial court. I think it's unfair, particularly in criminal trials, but any trials, I think it's unfair on the public to force them to be on television. But in the Constitutional Court judges shouldn't object and counsel usually don't object. And also it had been my experience in The Hague, where there was, all of the proceedings in the War Crimes Tribunals for Yugoslavia and Rwanda, were televised. And it was my experience, because I argued three...I opened three cases in The Hague, and I found after thirty seconds, one forgets the cameras are there. You get on with the job and you're involved in the cut and thrust and that's it. And eventually MTV threatened a court application under the Constitution, saying that the freedom of the media enshrined in the Bill of Rights was being violated by not allowing the television cameras into Court. And Albie (Sachs) and I got our colleagues to agree, that they could come in and film us only walking into Court and sitting down. And the minute the case was called they had to switch off the camera. Well they did that and after the first three or four times they decided to use the old clips. Why should they send a cameraman to Court to watch eleven people excitedly walking into Court and sitting down. They used the old clips. And then there was an embarrassment because in one of the cases

dealing with election rights, voting rights, Justice Kriegler recused himself, because he'd been Chairman of the Electoral Commission, and when they showed that on the eight o'clock news then, they used an old clip showing Kriegler walking in with everybody else, which was obviously an embarrassment. And we then talked them into allowing the Court also to televise us handing down judgments. But the rule was, Justice Chaskalson was adamant, only if we read from the agreed judgment. And that became a little boring as well and I remember one day with...I consulted just two or three colleagues, I didn't read from...it was my judgment, I looked straight into the camera and said what the case was about. And that was a good precedent, and that then began to be followed. And eventually the decision was taken to allow the cameras in without any restrictions. The MTV and SABC had been banging loudly at the Court door, but of course the minute they were allowed in, they didn't often come because it's a little bit boring. But at least they can...I don't know how often they come now but I presume when there's a cause celebre they do. So that committee was involved in that. It was involved in other areas, for example, I suggested that we should meet once a year with the editors of all the major newspapers, and hear their views about the Court and complaints. And we had complaints. For example, the reporters had nowhere they could sit and take notes from a court file. And we arranged for a special room in the old Court building to be set aside, with telephones, for journalists. So it was that sort of nitty-gritty thing as well that that was done. And also it gave rise to the summaries of judgments. That also came out with the media committee, which was successful. We organised a wonderful all day seminar. We got Tony Lewis to come from New York, we flew him out to give the opening address, and that was...these all helped, I think, develop a better relationship between the Court and the media.

Int In terms of the approach to judgments that the Constitutional Court took when you were here, I wondered whether you could talk about that, and particularly in relation also to judgment writing?

RG Everybody's got their own style. I remember at the very first meeting I talked about when we decided on robes and all the rest of it, I remember saying that obviously we'll have to, because there are eleven of us, we'll have to have numbered paragraphs. And John Didcott lost his temper and said, the last thing I will do, he said, on my dying deathbed I will never write in paragraphs! I don't write in paragraphs. And that was sort of the last word on it, and I was quite amused when I got the first judgment in the *Zuma (S v Zuma and Others)* case that there were...written by Sydney Kentridge, it was in paragraphs. Obviously you have to have paragraph numbers, otherwise for concurring or dissenting judgments, it would be very difficult to agree to part and disagree to part without paragraph numbers. But everybody, I think, had their own style. I've got a theory here that I think is probably correct, but the academics who were appointed to the Bench write much longer judgments with many more footnotes. But I think for the rest, you know, its...there are no rules about it. I think the reading through was very important. One interesting thing, the use of foreign law. I think all of us, or most of us, use foreign law often to try and convince colleagues to agree with your own point of view. And there was much more use made of it in drafts than there was often in final judgments. Because especially in unanimous judgments there was no need to copiously quote foreign law to the same extent. So the judgments were whittled down to an extent. If one compared drafts that were circulated by email to the final judgments, the final judgments were often maybe fifty percent of the length of some of the drafts that were sent out. But that's a good system and the other...you know, it's very different from the United States Supreme Court. In the US Supreme Court they meet once only in conference on a particular

judgement. We would meet sometimes ten times until it was clear. Obviously if there was unanimity we met once, maybe twice. But where there were differences between the justices, especially in important cases, we would go on and on and on conferencing until it was clear that there was no bridge between the majority and the minority, or if there could have been more than one minority. That was a very, very good system.

Int You were really at the Court when the premises were located at Braampark, and I wondered if you could talk about your memories of that particular building and how it functioned?

RG Well, you know, the meetings were exciting, I remember meeting after meeting, with architects, with government, and so on. Albie Sachs and I were always close friends and we would often discuss some of the, you know, he was obviously always over the top with excitement over the whole project. But it was, you know, the whole design process, the competition, it was very much part...it became part of our...almost of our daily lives. One of my disappointments and one of the reasons, one of the many reasons I hesitated in taking early retirement, was that I wouldn't sit in this building.

Int I also wondered what were some of the tensions that arose and the differences?

RG Well, there wasn't a great deal of tension, it was a very collegial Court. I remember there was one meeting, we had one informal meeting where everybody let their hair down. There was some anger, there were some tears, at some of the complaints that came from judges, but the fact that we could meet and let it all come out, in a two or three hour meeting, I think improved the collegiality of the Court.

Int Were some of those tensions that you're talking about, letting the hair down, did they relate to racism and sexism?

RG Yes. I'm not sure about sexism, but certainly racism.

Int And what was the general perception from your perspective?

RG Well, you know, none of it really surprised me fundamentally. Some of it did, some of it didn't, because I understand, you know, if one has lived a life of prejudice and racial oppression, I don't know that you ever recover from it. So it's always there, and being patronised or even the perception of being patronised is a horrible thing. And often these things happen thoughtlessly, so it was very important that these things came out, because they cleared the air.

Int What was unique also was the experience of working with law clerks, researchers, as they were called, I wondered whether you could talk about your experience of working with law clerks?

RG Well, you know, I was, I think, possibly the only judge before the Constitutional Court, who always had a law clerk.

Int Oh, really? At the Bench?

RG On the High Court. Not in the Appellate Division, because there wasn't room. But when I was in the Transvaal Court, I had a clerk, and we got the Dean of Wits Law School to send the brightest graduate who was interested, to become my law clerk. And I was able to do it because I

decided I preferred that to having a secretary, so I did my own typing with two fingers, and had a law clerk. And I found that very useful, to get young...to get very bright, young men and women students to assist me. So it was a system that I've always appreciated. And I had one American law clerk as well in the High Court...no, two. The first was a Stanford University law school clerk who came from Chicago. And then I had the first ever black law clerk in South African history, who was an African-American, who was with me in 1988, and who I've kept contact with, in fact. My wife and I had a lovely tea and walk around a garden in California earlier this year with him and his wife and two children. His name is Vernon Grigg III. And he really set the Courthouse upside down. There was a lot of opposition to a black coming to work in judges' chambers. Especially some of the white women in Pretoria objected very vociferously, but it was overcome because the Judge President, fortunately, was firm about it. And very soon after that, some other judges, still during the latter apartheid years, had black South African law clerks. One important aspect, I think should be put on record, and that was, before I agreed to the Vernon Grigg (III) coming to me, I consulted with a Black Lawyers Association, Justice Moloto, now of course a judge in the Yugoslavia tribunal, was then one of the senior people in the BLA (Black Lawyers Association). Keith Kunene was the President, and Majunku Gumbi was Justice's (Moloto's) deputy. And I met with Justice (Moloto) and Majunku (Gumbi) and said that I was thinking of taking an African-American law clerk, what would their approach be? And they were absolutely against any cooperation with a white male Bench. They wouldn't allow their members to become...to sit as assessors...and I'll come back to that in a moment. But I said to them, you know, I'm not prepared to have Vernon Grigg (III) come if you don't accept him. If you're going to treat him as an Uncle Tom, it's not fair to have him here, and frankly it's not fair on me. And I said I think you should go and think about it. He's not South African and he could break a ceiling. And they had hours of

meetings about it and came back and said, we think it's a good idea, we will welcome him. And Vernon (Grigg III) came for four months. He lived for the first two months with my regular white law clerk, who was married and they lived in Westcliff, and then he became friendly with Majunku (Gumbi) and ended up spending the second two months in her home, with her husband, in Soweto. And Vernon (Grigg III) also ended up having a very close relationship with my younger daughter. He took her to many parties in Soweto. So it all worked out very, very well. And Vernon (Grigg III)...it's a wonderful ending to the story because in the first elections, Vernon (Grigg III) came back to South Africa and was the registrar of the Electoral Appeal Court. And I then got him a job as a law clerk in California with Judge Thelton Henderson who was then the Chief Judge of the Federal Court in San Francisco and who was incidentally the first African-American ever appointed to the Bench in California. Judge Henderson remains a close friend. So I took naturally to having law clerks and in fact it was as a result of a meeting I had with Atlantic Philanthropic, with the leaders then, who came out to see what they should do in South Africa. They had never been involved with justice. And I said, what about paying for a second clerk for each justice to be appointed on an affirmative action basis? And they loved the idea and that's how we got a second clerk in those early years, and of course after a few years the government agreed to take that over and to pay for two clerks, but one at least had to be appointed on an affirmative basis. And it's been wonderful. I just love the contact I've kept up with, I think, the majority of my former clerks still, getting advice, telling me about children being born, invitations to weddings and so on. So that's been a wonderful experience.

Int Richard, what was the basis of your choice of law clerks? How did you choose them?

RG Well, you know, there were so many...hundreds of applications came in, and I got my existing law clerks, the three of them...I always had a foreign law clerk. I was lucky that most of the judges didn't want foreign law clerks, so I had one every year I was on the Constitutional Court. I'd get the three of them to sift it; to go through, and give me what they thought were the twenty best. And I would then have a shortlist of about eight or ten, from the twenty, and have interviews with them.

Int And your memories of working with law clerks, what was the process?

RG Well, the process...I never had a first draft done by a law clerk. I didn't like that. I preferred to do my own writing, and give it to them. And really it was a wonderful process of debate. In many cases my law clerks changed my mind about this or that, or how to put things, so it was a very constructive arrangement. I must say, what I enjoyed too, I was very...particular...I think my closest friend on the Court was probably Kate O'Regan. Our chambers were next door to each other, which sort of helped. But we had an unusual process of, in some cases, and particularly difficult cases, having a conference, of the two of us with our six law clerks. And to-ing and fro-ing and so on.

Int In terms of the cases that you actually sat on, what were the cases that really stood out for you, the judgments that you wrote, that you'd like to talk about?

RG Well, obviously the first one I wrote, which was *Hugo ((President of the Republic of South Africa and Another v Hugo)*. That stood out because it was the first. And also because I was in the minority and ended up getting unanimity on the one point, and only one dissent from Johann Kriegler on the other. But that stood out. And that went through many, many writings. Arthur Chaskalson used to allocate judgments sort of on

themes. So Laurie Ackermann did the gay and lesbian cases, I did the equality cases, *Hugo (President of the Republic of South Africa and Another v Hugo)* and *Harksen (Harksen v Lane NO and Others)* and *Carmichele (Carmichele v Minister of Safety and Security)*. *Carmichele (Carmichele v Minister of Safety and Security)* stands out because it's a case I think I felt most strongly about of all the cases that I participated in. And I was in the minority on *Carmichele (Carmichele v Minister of Safety and Security)*, and Laurie Ackermann wrote a very opposite judgment. And Arthur Chaskalson brilliantly put the two together, and it became a unanimous judgment. But I think those...obviously the certification (*Certification of the Constitution of the Republic of South Africa*), which obviously I didn't write, but we all had a hand in, was important.

Int In terms of leadership, Arthur's (Chaskalson's) leadership in particular, I know you'd known Arthur (Chaskalson) before, but I wondered whether you could talk about how that worked? What were the challenges as well?

RG Well, Arthur (Chaskalson) is a strong leader. He...I think, like any strong leader, he was happier when he got his own way. But he didn't make people feel uncomfortable at all if they disagreed. Nobody hesitated to disagree. Which I think is the essence of good leadership. But again, you know, as I'm sure you've been told, the procedure again differs from the United States Supreme Court, where people talk in order of seniority. We don't. The President, now the Chief Justice, I presume still opens the discussion giving his view, and then you put your hand up and you talk in any particular order that your hand goes up. And I think that also made for collegiality, that there was no pecking order...and of course at the very first meeting of the Court, a crucially important decision we took, was that there would be no seniority. I

remember, if I can just mention that discussion, we...I was the most senior judge appointed during the apartheid system, I'd been on the Appellate Division, Johann Kriegler came next, also from the Appellate Division. But it was obvious, that if Ismail Mahomed had a white skin, he would have been senior to us. He was senior to me in silk. He would have been appointed the judge before me and I was appointed before Johann Kriegler. So we weren't prepared to have that apartheid seniority be taken into account at all. So what do we do? And I remember the oldest member of the Court was John Didcott, who suggested with a glint in his eyes, that we should rely on age. Laurie Ackermann suggested alphabetic order! And I don't remember whose suggestion it was, that there shouldn't...that we don't need seniority. The President would sit in the middle, in those days there was no Deputy President, but that we would all have different seats each term, and walk in and out in a different order each term of the Court. And that's the way it's remained to this day, and the judgments are signed in alphabetical order. So there's no seniority, and that's remained, even though when a new judge comes onto the Court, he or she has the same seniority as the other ten. And I think that helps collegiality too. I mean, in the Appellate Division, everybody walked in order of seniority, not only in and out of Court but even into an elevator. Or into the tearoom. And that's not a good idea.

Int I'm also curious, I'm wondering about your relationship with the three members who have passed on: Tholie Madala, Ismail Mahomed and John Didcott.

RG Well, I knew John Didcott for many years before, and as I said, he was one of my heroes and certainly a role model, and I enjoyed John Didcott. A difficult, difficult person, but with a wonderful sense of humour. We'd been to many conferences together, and our wives and

we became friendly. So it was a great loss, personal loss, and professional loss when John Didcott died. Ismail Mahomed I knew from my student days. When I joined...when I came to Wits in first year BA, Ismail Mahomed was one of the leaders of the SRC (Student Representative Council). I remember him talking from the Great Hall steps, he was a wonderful orator and I remember being absolutely glued...my eyes were glued to Ismail Mahomed. Little did I think that I'd be on the SRC (Student Representative Council) at the end of that year. Ismail (Mahomed) was then in final year, so when I...in my second year he was already at the Bar. And when I joined the Bar, I remember one of the awful experiences of my life was I had a case against Ismail (Mahomed) in the Benoni Magistrates Court, and it came to lunch and I said to Ismail (Mahomed), "can we find somewhere to have lunch together?" And he said there isn't such a place in Benoni. So I said, "well, if you can't go for lunch, nor am I". So neither of us had lunch on that day. And we had a similar experience in Bloemfontein. The first time I ever appeared as counsel in the Appellate Division, it wasn't against Ismail (Mahomed), he was in a different court, but he had a two-day appeal, and I remember having a sleepless night of anguish. Ismail (Mahomed) couldn't...he had a two day appeal, he wasn't allowed to sleep in Bloemfontein, because he's Indian, he had to drive what over a hundred miles to Kimberley, into the Cape Province, and then drive back the next morning for the hearing. And I remember thinking to myself, I just don't understand how those judges, who obviously know this is the position, don't do something about it. Because they could have. Just a threat of a public objection would have got that law changed. So, you know, I knew Ismail (Mahomed) well and we'd always been very close colleagues. We were never social friends at the Bar, but we certainly were when we were together on the Constitutional Court. And I think, you know, the collegiality was also helped by a lot of socialising. There was a dinner of the judges and spouses at least once a year. My wife and I had, I think, on two

occasions, had dinners in our home for the whole Court. And that helps, I think especially having the spouses along, they get to know each other.

Int I wondered, in terms of your particular judicial philosophy, how that evolved over time while you were at the Court?

RG You know, I've always had a problem with jurisprudence. The one distinction I didn't get at Wits was for jurisprudence. And I've always admired and felt a little bit sad that I haven't got the ability to write philosophical treatise. I don't have that ability that Laurie Ackermann and Arthur Chaskalson and some of the others have. So I'm much more of a practical lawyer, I think. I think you'll find my judgments are short judgments, not long judgments. I decide what has to be decided and I don't use long sentences and a lot of footnotes. So, you know, it's a matter of style, and ability or lack of ability.

Int I'm curious in terms of being practical and the issue of socio-economic rights, the emphasis in this Court on socio-economic rights. What's your perspective on that?

RG Well, I've always been strong in favour of social and economic rights. I think it's absolutely essential for...if the Constitution is to have any meaning. And for it to affect the people who need to be affected. And you know, the story is told and I'm sure it's correct, that the majority of the Constitution writers, felt that the Constitution, if it was to reach people, had to include social and economic rights, and they had to be justiciable. But obviously there's a great fear that any judge has in going into the fraught field of social and economic rights because of the fear of interfering with the legislature in particular, not so much the executive. But the legislature is so much better positioned to deal with

social and economic rights. You know, I remember during argument, Geoff Budlender argued for the Legal Resources Centre, argued for a minimum core. And, you know, it was sort of...it hadn't been much...it hadn't been argued in the lower courts, as far as I recall. I may be wrong. But it had tremendous appeal for me. But, you know, I was persuaded during conferences that the minimum core wasn't the way we could go, because we simply had no information on which to base it. And we ended up being unanimous in *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, and *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*. But I think they...their importance, I think, lies in accountability. I think the fact that government knows that ordinary people can take these issues to Court, makes for better government. And that's something that I think that's often missed. I think accountability and a system of accountability, which I think our Constitution really has at its core, is so important. It's not the cases that come to Court that are so important, it's the cases that become unnecessary because governments are accountable.

Int Do you think in any of the socio-economic cases, you've mentioned *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*, do you think that any of them came very close to dictating to government, that's a fear?

RG You know, I don't. I think, you know, *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* is often mentioned, but the government had already chosen Nevirapine; the objection was that they didn't spread it widely enough, and there were no cost implications. I think the most, from a financial point of view, probably the most, certainly during my term on the Constitutional Court, and

during its first fifteen years, was in the *Khosa (Khosa and Others v Minister of Social Development and Others)* case, dealing with social welfare grants. Which cost the government some tens of millions of rands. Not keeping it to citizens but including permanent residents. That was an interference but as Justice (Yvonne) Mokgoro explained in her majority judgment, it wasn't unanimous. I think it was quite a big majority but she wrote for those of us, the majority, explaining that there were two issues here. Firstly the Constitution talked about everyone being entitled to these rights, and there was a question also over equality – that it was a violation of section 9 to distinguish between citizens and permanent residents in respect of these grants.

Int I'm also curious, in terms of the issue of pragmatism and principle, you've described yourself as a practical person, is there a binary relationship between pragmatism and principle?

RG Well, you know, obviously there can be a tension between pragmatism and principle, and both have to be taken into account. That's what judging is often about. You know, principle in the end, I think, has to be given absolute priority. I don't think judges in any...I don't think any judge, in any court, let alone an apex Court, let alone the Constitutional Court, should in any way compromise principle. But often there's a grey area. You know, principles sometimes aren't that clear. They're not black letters, they're often in grey letters. And it's in those areas that one can and should allow pragmatism to at least influence a decision. But, you know, it's difficult to generalise, I think one's got to deal with it really on a case-by-case basis.

Int Okay, in terms of the politics of the country, how relevant or irrelevant is it to the decision-making?

RG Well, you know, that's a difficult one. I mean, obviously judges know what's going, or certainly should know what's going on out there, and must be aware of the effect of decisions that they make. And that's often the challenge. But again, I don't think principle must ever be the victim of that. What's important is the way judgments are worded. And if you look at some of the difficult decisions of the Constitutional Court, it hits any intelligent person, I think, in the eyes, that the wording has been carefully, carefully chosen in order to soften any decision that might be thought to be anathema at a government in particular. But not only to government, to sections of society. The thought that comes to my mind was Justice (Johann) Kriegler writing the only Afrikaans judgment in the history of the Court, in a case dealing with the rights of Afrikaans speakers. I mean, it's that sort of pragmatism, and it is pragmatism that can be important.

Int Richard, in terms of considerations of exercising power as a judge, and how that is contrary to state power, I wondered whether you could talk a bit about that relationship?

RG Well, you know, particularly in my apartheid years that was very much an issue. In fact, the case that comes to mind again involves the Legal Resources Centre. The LRC (Legal Resources Centre) got a judgment (*Komani*) from the Appellate Division to the effect that the black people who got permits to come into the city could bring their family with them. And I came into the unopposed motion court in Johannesburg and there was an application by the LRC (Legal Resources Centre) to compel an administrator in Soweto to stamp the man's papers to allow his family to come in. And I remember, Felicia Kentridge was counsel, and I said to her, "Mrs Kentridge, I don't understand how there's an unopposed application against a government official, to compel him to do something that the Appellate Division has already said he has to

do". And she said, "My Lord, this is one of many cases. What they're doing is they're ignoring the judgment of the Appellate Division, there was no such thing as a class action, so we had to bring each one....let's say, a thousand were being kept out, and they'd let in those that came to court". And I said, with my eye on the journalists in the press box, I said, "Well I don't think this is good enough". I said, "I don't think that this court can accept that a government official is not carrying out the law", and I said, "I think that at the least I should"...she said, "well, what can you do?" And I said, "The least I can do is to instruct the Registrar to send a copy of the judgment I'm going to now deliver to the Minister, who was Piet Koornhof, and say that this court expresses the greatest displeasure of this". The result was a little bit unfair on (Piet) Koornhof, because the huge posters the next day was Judge castigates minister, which I hadn't done that. I didn't know the minister was involved. (Piet) Koornhof issued a statement immediately saying that these officials were acting contrary to a memorandum his department had sent out, and it would stop immediately. And he approached me personally that night and asked me if I would agree...if I'd have any objection to him saying that what had been reported was unfair. And I said, absolutely not. I said, you can say that you've spoken to me. But here, there was really using the court against power, but one was able to do it. One of the strange...you know, we were a very strange society, that in the apartheid days, what judges said was done. I mean, it was almost...it was automatic. I mean, when I visited prisons, as I did for years, if I told a prison administrator, the chief warden to do something, I've no legal right to tell him to do it, it will be done immediately. What a judge said went, and that was it.

Int There's this strange anomaly, the adherence to the rule of law in a society that was so legally discriminatory, and I wondered whether in a post apartheid South Africa, what your perceptions are about the adherence to the rule of law?

RG Well, you know, I think South Africa has very quickly become a more normal society. I mean, nobody likes the law breathing down her or his neck. And I think that's common. I think the objections that we now see coming from the legislature, and particularly from the executive, are by no means peculiar to South Africa. I mean, it's happening in the United States of America with Congress passing resolutions...passing resolutions, not binding, but passing a resolution saying that judges shouldn't refer to foreign law. I mean, imagine if this would happen in South Africa, imagine the uproar there would be if Parliament passed a resolution saying that the Constitutional Court shouldn't do this or shouldn't do that...no court should do this or shouldn't do that. So it's...you know, I can understand people getting hot under the collar about it. But to me it's a symptom of normality, not the reverse. And of course there was no true respect for the rule of law during the apartheid era. The reason some judges were able to do 'good' things, and I say good in inverted commas, the reason they could do that was because the apartheid government didn't like saying what they were doing. They used the law, and they would only use the law, but they would use vague language. They didn't say that people convicted under the Group Areas Act shall be evicted. They said may be evicted. But they knew the magistrates would evict everybody. And even in the naming of statutes, I mean, it's infamous the university apartheid act was called the Extension of University Education Act. Very opposite. And this was part of their PR. So it wasn't respect for the rule of law, it was in fact evading the truth.

Int Richard, you've been a judge prior to coming on to the Constitutional Court, currently in terms of judicial transformation, what's your perception of broader judicial transformation in South Africa?

RG In this society?

Int Yes.

RG You know, I've always been surprised at these negative opinion polls that I've read. You know, we all live in a very small sort of cocooned society. All of us. So one can't generalise. The sort of society in which I move, has respect for the Constitutional Court and for the rule of law and judgments and so on. And similarly for Parliament and for the executive. So those negative perceptions both of Parliament, but particularly of the Constitutional Court, shook me, and it's certainly not the impression...I mean, when I, not so much today but when I was on the Court and certainly in the early days after the Goldstone Commission, when I'd be recognised in airports and shopping centres and so on, I never had a negative response. There were always people who were saying, we're expressing support, often gratitude, for what judges were doing. So, you know, I'm the wrong person to ask because my life's experience has been contrary to what I've read opinion polls are showing.

Int In terms of judicial transformation, purely in terms of demographics, there's a concern that young judges are being appointed, judges with very little experience, to the Bench, do you get a sense of that concern?

RG Well, I'm really a very firm supporter of transformation. I think it was absolutely crucial. When you think in 1994, it was almost a hundred percent white and male Bench. And it's amazing that there was any respect at all for the courts or the judiciary. But there was. There was still some respect. Not too much, let me say, but I'm talking about particularly in the black community. They didn't see anything to do with

government, including the judiciary, as being friendly, and the very converse. So I think if the whole court system and the judicial system had to earn respect, there had to be very rapid transformation. And as I say, talking from the Constitutional Court as a member of this Court, that transformation wasn't so important internally, it was the face of the Court to the public that is crucially important.

Int With respect to the transition to democracy and the role of the Constitutional Court, what were the challenges that were then when you were on the Court and what are the challenges that remain?

RG With regard to transformation?

Int With regard to the transition to democracy?

RG You know, I think, it was really to help judges particularly who hadn't had judicial experience because there were some judges who'd never been judges. And I think it was important. But you know, it really wasn't a difficulty. I think it would be a gross exaggeration to say that this or that had to be done about it. People came on board running. And it's amazing how that lack of experience didn't really matter. I think some of the great justices of the first Constitutional Court hadn't had previous court experience.

Int The first Bench that you were included in...they have really been described as the Glory Bench, do you have any concerns about subsequent appointments?

RG You know, maybe about this appointment or that appointment, but generally, you know, I've been teaching a course on the Bill of Rights

using decisions of the Constitutional Court. I'd say at least half of the cases...half the judgments I use have been written since I left. And I'm proud to teach every one of them. And I really think the standards have been maintained and I feel tremendous pride and continue to feel tremendous pride in what the Court is putting out. Because I read, I'd say, ninety percent of the judgments that come out, and I enjoy it. I may not agree with this one or that one, I might agree with the dissent rather than the majority, but so what? I felt the same way when I was on the Bench.

Int What do you think have been some of the failings of the Court?

RG That's a difficult one. I think...maybe one of the failings of the Court has been the lack of accessibility to some of the judgments. You know, who are we writing for? We're writing firstly for other practitioners. We were writing for the public. But that's difficult. I think all courts go through that problem. I think we tried and I think the Court continues to try to write in accessible language. I mean, we went out of our way not to use long words. We banned Latin expressions, for the same reason. But I really, you know, I can't...it may sound immodest or maybe stupid, but I really can't think of any serious mistakes that we made, other than possibly not allowing the television cameras in sooner, even though they wouldn't come.

Int And what have been some of the greatest achievements of the Court?

RG The greatest achievement has been really to make the Bill of Rights a living instrument for the notoriety that the Court has obtained. I mean, I enjoy reading ridiculous threats in some of the newspapers, saying, I'll take you to the Constitutional Court. I mean, that's a compliment that people see this Court as a place where they're going to get justice,

even if they're the biggest crooks in the world. It doesn't matter. I think it has been an achievement to make a brand new Constitution something that works, because it could have turned out very badly, and I think it was the leadership in the first years of the Court. And I feel very proud to have been part of that.

Int In terms of, are there any fears or concerns you have for the Constitution and the Constitutional Court, for the future life of this nation?

RG You know, I've got no serious concerns. I think things that are happening, I think recent statements made about the Court are unfortunate, but I don't believe that there's any serious threat to the Constitution or to the independence of the judiciary. I think there are enough people out there who know what it's all about. And the exciting part of living today is the power that the people have, not only in democracies but now with the Arab Spring and what's happening in many other countries, in Russia, for example. I think leaders...and it's part of modern technology; I think its Facebook and Twitter and all the rest of it, that have really empowered people, and people appreciate freedom because they know it's for them. And I think the Bill of Rights will become more popular and not less popular in this new world that we're already in.

Int Richard, you've gone on to do wonderful things, I don't think you're retired but you've gone on to do wonderful things in your long illustrious career, but in terms of being part of the Constitutional Court, where would you place it in your life trajectory?

RG You know, I think the most enjoyable thing I've ever done is what I'm doing is what I'm doing now, and that's teaching. I didn't know until I

began teaching how much fun it would be. And it was one of the reasons I took early retirement was when I was offered the opportunity of teaching for a year in New York, with NYU and Fordham. So I would put teaching as the most enjoyable and most meaningful in being able to influence people, being with bright young women and men, and the toing and froing, and also academic life. I mean, it's wonderful teaching at the stage of my career when I did it, because I've never got involved with the pettiness and the administration that academics have to live with every day, so I've been having my cake and eating it in a way. I've been moving every semester. But professionally, obviously the Constitutional Court was the sort of peak of my career and the most exciting and innovative. And the most difficult.

Int Really?

RG There were no easy cases.

Int There are never any easy cases...

RG Absolutely.

Int Richard, I'm wondering whether I've neglected to ask you something that you'd actually like included in your oral history?

RG Not really. I think you've covered just about everything.

Int Thank you so much for your time.

RG It's a pleasure.

Collection Number: AG3368

CONSTITUTIONAL COURT TRUST ORAL HISTORY PROJECT

PUBLISHER:

Publisher:- **Historical Papers Research Archive**

Location:- **Johannesburg**

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