

Int This is an interview with Professor Hugh Corder, and it's the 4th of January 2012. Hugh, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

HC Pleasure.

Int I wondered whether we could start by talking about early childhood memories, where you were born, your family background, and also some of the formative influences that may have paved the way towards a legal trajectory?

HC Okay. I was born in 1954, in Rondebosch, here in Cape Town. To a, in some ways, a relatively conservative English speaking family. My father was an attorney, he never went to university, couldn't afford it...his parents couldn't...so he became an articled clerk at the age of sixteen, straight out of high school, and did the five years, and then went to war in the Second World War, and lived at home. And was not a...maybe because of absence of tertiary education, not a hugely forthcoming articulate sort of person, but he believed absolutely fundamentally in the law, provision of legal service as public service. And he was also very involved with the Anglican Church as the legal advisor to the Anglican Church, so...and there's a connection to that later on in what I'm going to say. So he never would have voted for the Nats or anything like that, but quite a United Party type at the time. But would have done Torch Commando kind of stuff. My mother did go to university; she was the daughter of a missionary in the Eastern Cape. My parents were both very old, so they would have been...my dad would have been a hundred and two today; my mom would have been ninety-nine or ninety-eight. And I was the youngest of three. I went to...and my mother did go to university, she went to Rhodes University in the late 1920s, and did an economics degree and she was more of a, I suppose, interested in ideas and talking about them than my dad was. I went to school in great privilege at Bishops here in Cape Town, from standard one to standard ten. It wasn't the hugely wealthy and privileged place it is today, and I've got very clear views on that. There was a degree of emphasis on, let's say again, public service and justice in the education that I got from any number of the teachers there...or some of the teachers there. There was an Anglican foundation to the education. There was an incident in standard seven or standard eight, grade nine or grade ten, where the son of a coloured priest, Father Clive McBride, wanted to come to the school. He'd failed the entrance exam but even if he had passed the entrance exam, the College Council probably would have refused him entry and all the school pupils signed a petition, etc, etc. But such were the conditions of the time of the, let's say, mid to late sixties. There's that incident at school but, you know, the South Africa of the time, I've often thought about this because quite a lot of people have asked me what stimulated the kind of trajectory that I went on. I

wasn't sufficiently conflicted to refuse to do National Service. In fact, you know, nobody that I knew of refused to do so at that stage...I did it in 1972, I was seventeen. Did it in Pretoria for a year. Sat around and, you know, just...there was no really sort of evident military engagement aspect of National Service at that point. But when I arrived on this campus in February '73, the NUSAS eight, and the SASO eight, had just been banned. And that began to stir things up in me. And why did I do law, because I wasn't pushed that way by my dad at all. In fact, I registered for a BCom degree, because I didn't want to do engineering or medicine and the BCom...I did BCom law, and I really only became interested in the law in my fourth year. So having done the BCom I was really interested in economics. But, my mother was involved in the Black Sash, and United Party kind of stuff. And that was...my friend Dennis Davis always teases me because he knows that even early in 1974 I had helped my mom do some work in the United Party. But I suppose with the Portuguese coup of April 1974, it's a very clear memory in my mind, I was second year at university at that point, with freedom coming to Angola and Mozambique. In 1974 I...Dimbaza had also hit the headlines. This was an instance of moving rural people, "consolidating" them, in order to create concentrations of black people to make up the "homelands"...the relocation was to Dimbaza, and David Russell, now the Bishop, having publicly fasted on the steps of St George's Cathedral, had a great impact on me...and this is where the Anglican Church issue comes in. Because I decided in my June vac of 1974, that I wanted to go and volunteer. I volunteered to work for the Border Council of Churches in King William's Town, run by a guy called Temba Sibeko who's brother was running the PAC in exile at that point. And the offices of the Border Council of Churches were at 15 Leopold Street, King William's Town, which is where Steve Biko and everybody else, and Mamphela Ramphele were banned to. And as I arrived there this handsome, accomplished young man took me aside and told me his name was Steve (Biko) and he was checking me out, I realised in retrospect. Anyway I worked there for two weeks, and came to know them quite well. because they openly flouted their banning order, sitting in public, the cops were running around outside, or sitting in cars outside...and that was an extraordinary moment in my life...when I came back here and told friends that I'd met a guy called Steve Biko, because I hadn't heard of him in advance, I learnt a bit about him. And to hop forward, so I don't forget, I mean, the manner of his killing in September 1977, really was one of the most fundamental moments of my life. I was a final-year law student, I'd just broken a tendon in my knee playing rugby, and I faced my last three months...couple of months of, you know, law studies, and then uncertain future. Soweto having happened in the middle of June '76...and that's when...I had been involved in RAG and stuff like that here on the executive, but I got involved, very heavily involved in NUSAS from the middle of 1976 onwards. And I was on...I ran a NUSAS national project after graduation in 1978. And then lots of people were getting out and I wanted to go and...I went to Cambridge and did my LLB...what's now called an LLM, there. And then just before I left I applied for a Rhodes Scholarship, after consultation with Fink Haysom, and all sorts of people who were running NUSAS at that point, and they said, you know, it depends, even if it's Cecil

Rhodes' money, it depends what you use it for. And I...so I was awarded the Rhodes scholarship and that got me to Oxford the year after, which is when I did my PhD. And having done my LLB, as it was called, at Cambridge and written a whole lot more exams, I just decided that I didn't want to do any more exam writing and going to lectures, so I...John Dugard had just published *Human Rights and the South African Legal Order*, and I, as part of my NUSAS national project in 1978, I'd gone on a tour to the then NUSAS campuses: Rhodes, Pietermaritzburg, Durban and then Wits. And at Wits, through a woman called Clare Bowes, who was the head of the Law Students Council, we organised a conference on legal education and legal aid. And we also...I started a little journal which ran for two issues called *Lexis*, and it was sort of a play on law in praxis, and a little bit of Marxism in there, etc. And we had a dinner at that conference and Arthur Chaskalson was the guest speaker. And as the sort of leading "heavy radical" at the dinner, when it came to after his speech, I stood up publicly to challenge him, saying, "what are you a commercial silk doing about the poor and access to law", etc, etc? Of course, I didn't know, that he was already in discussions about setting up the LRC at that point. So, you know, and he remembered that and we laugh about it now. But...so when I came back at the end of 1982, with an Oxford doctorate, the LRC was up and running. But...because the possibility of going straight into legal practice in 1978 after I'd graduated was not possible, because there was nowhere that I would have felt comfortable, although I could have walked into more or less any legal firm here.

Int Why was that?

HC Because there was no real public interest law firm, rather there was what used to be called *in forma pauperis* work being done. But there was no institutional firm sympathetic to the kind of work that I would have wanted to do.

Int And were CALS or LRC an option?

HC It didn't exist. They would have been an option, I would have absolutely gone there. You know, I say to the final year law students today, that if I'd had the option of going to the ConCourt as a researcher or to do the LRC or the Women's Legal Centre, or whatever, that's where I would have gone, but there was nothing, absolutely nothing at that point. Anyway, when I came back then being the end of '82, it seemed to me that with a doctorate and with an interest in...my doctorate was on political attitudes of the Appellate Division from 1910 to 1950. And it seemed to me that that would be the best way of...that the relative space, which existed in universities, would be a place to situate myself. So I applied here, and they told me there were no vacancies. It subsequently transpired there was a vacancy, and there was a...

Int Was that because of your NUSAS background?

HC Well...I think partially. It was said that there was a much tamer guy, but no...it subsequently transpired he hadn't completed his doctorate, he'd been promised the senior lectureship here. But Stellenbosch approached me to go and work there, and on my way back through Johannesburg I stayed with Edwin Cameron and I chatted to John Dugard and I said, you know, Stellenbosch wants me to go for an interview next week, and John (Dugard) said to me, they'll never offer you a job! But if they do, take it! And I got interviewed in a very cursory manner at Stellenbosch, and the guy who was the Dean of the faculty at that point was a kind of an old-fashioned, in the best sense of the word, Afrikaner snob, and he liked the fact that I'd been at Bishops and that I would come to Stellenbosch, and they offered me a job. So I started from mid '83. And it was one of the best things that's happened to me, because for four and a half years, the lead up to the State of Emergency and the resuscitation of NUSAS there, I was the honorary vice president for Stellenbosch. It was a crowd of really good law students, Henk Smith, Johan van der Merwe, David Waddilove, etc, etc, Dawie Bosch, who were the kind of lefties at Stellenbosch at the time, and I became acquainted with a man called Johan Degenaar, who was a philosopher, and taught with André du Toit the political philosopher. And I taught Marxist jurisprudence at Stellenbosch University as an option course and it was the only option course in Marxist jurisprudence in South Africa at the time. I published...I've been very friendly and close to Dennis Davis from the time he lectured to me...in fact before that, the time he was a final year law student because he was two years ahead of me. I put together a jurisprudence reader called *Essays on Law and Social Practice* with...Dennis (Davis) and I wrote the introductory chapter, which was kind of a...as a left piece on South African law, with the exception of Raymond Suttner's 1973 article in *Acta Juridica*. But Raymond (Suttner) became a friend and I invited him to lecture at Stellenbosch, you know...so Stellenbosch was fantastic in that the law faculty protected my academic freedom.

Int Interesting...

HC Despite, you know, the authorities at the university being clearly very heavy-handed and wanting to know who is this guy and what was he doing...

Int What do you attribute that to?

HC A curious thing, one is that the guy who was the strongest force in the Faculty at that stage and who may have really clamped down on me, a guy called Andreas van Wyk, who became the Rector of Stellenbosch in the 1990s, left the faculty after a year of my being there, to become Director General of Constitutional Affairs under Chris Heunis...and a much softer guy took over as the dean. But even Andreas (van Wyk) fundamentally respected differences of

opinion on intellectual matters, and he had also interviewed me, so maybe he would have continued to protect me: he is an enormously learned and cultured and able man. There were also younger professors at the faculty who were products of Stellenbosch, who to this day, I think, overinflate the role that they feel that I played. But they felt, I think, restricted in speaking out, but because I was an alien, I was almost the only English speaking, I was the only UCT graduate to be employed by Stellenbosch law faculty until about 1999. And, you know, I felt relatively unrestricted, and I fell in with the kind of 'anders denkendes', as they were called, the other thinking people, at Stellenbosch. And I started an advice office in the townships there, and got money from Barry Streek at something called the Social Change Assistance Trust here. And there were possibilities there, and I think we were relatively protected by being academics and by being maybe at Stellenbosch. But it also...what it also...my...what it opened up for me, the years at Stellenbosch was, not only exposure to a very different culture but people like John Dugard and others said, you must go to Stellenbosch and go and see Hugh Corder. So Rick Abel came, the guy who started Street Law from Georgetown University, Ed O'Brien, he came...so many, many, many, many people who came and did the kind of visiting route and would go to Wits and Cape Town, came across to Stellenbosch, and I was able to give them an opportunity to lecture, etc, etc. So I'm speaking too much about that kind of stuff...

Int No, not at all...

HC But then in 1986 the guy who it seemed had sort of blocked my return to UCT, who had been the dean at the time, emigrated. And the chair of public law came up and I applied. And Etienne Mureinik applied I think as a means of persuading Wits to make him a full professor, etc, etc, but they offered me the job and I came back here from July 1987 during the State of Emergency...Dennis (Davis) was my closest friend here (means UCT), and things just sort of went from there.

Int At what point did you then become involved in terms of the transitional negotiations?

HC Okay, because of the Dakar visit in July '87, they only took Afrikaans speaking people on that trip, but I knew a guy called Jannie Gaggiano, he was a political scientist from Stellenbosch, and Gerhard Erasmus, who was a professor of law at Stellenbosch, and I knew about the Dakar visit well before it happened, because they said...I met with them, and we talked about who should go etc...so that's another thing that Stellenbosch opened up. And then in 1988, the idea was to put together a group of mainly white Afrikaner law academics and lawyers to go and meet the ANC Constitutional Committee. And I went to Harare in September 1988 with Gerhard Erasmus [error], to meet Bridgitte Mabandla and Penuell Maduna, and Vusi Pikoli, in order to arrange what then became the delegation which visited in January the 20th or

so, 1989, funded by the Friedrich Ebert Stiftung and Cold Comfort Farm Trust; a meeting between the ANC Constitutional Committee, where Albie came out publicly for the first time after the bomb...he was there. Thabo Mbeki was there, Steve Tshwete was there, Zola Skweyiya, Penuell Maduna, Bridgette Mabandla, etc, etc, etc. Kader wasn't there. And I was one of...so Gerhard Erasmus and I...September '88, went to Harare to meet them to set that all up and I was the internal, or the "passport carrying" South African rep on the steering committee of that three-day conference. Zola was the ANC one, and Reg Austin, who was the dean of the faculty at Zimbabwe, was the third. So the three of us kind of were the steering committee there. Then Ronald Dworkin organised the Nuneham Park conference and came and chatted to Dennis and me in December 1988 about who should be invited, who were the 'wicked' judges, as he called them...who should be invited to go to Nuneham Park in June 1989. And then there was a Columbia meeting in October 1989 and I met Kader and Frene Ginwala and a whole lot of people at Nuneham Park. And then there was the October '89 meeting at Columbia, with Lou Henkin and a whole lot of other people. And I think Lou Henkin was a person whom I'd met through the John Dugard connection while I was at Stellenbosch. So I became very, you know...I knew them well. I've got some lovely photographs that I took during that September visit. In fact, even the Harare visit, I've got a picture of an informal rugby scrum with Edwin Cameron, Penuell Maduna, Dennis Davis and maybe Nico Steytler or someone like that. But I have never belonged to a political party, ever, and I still don't. And part of it was the fact that as a teacher I thought that one shouldn't nail one's colours too closely to a particular organisation. But I was also...sorry, during the 1980s as well I was very involved in the Civil Rights League. There was a memorial service for a wonderful woman called Dot Cleminshaw on the 29th just last Thursday, in the Cathedral. And Albie (Sachs) spoke and Desmond Tutu spoke and it was a who's who of kind of old grey-headed liberals in the Cathedral. It was wonderful, I can say that unashamedly.

Int This was recently?

HC Now, last Thursday. Because Dot (Cleminshaw) had taken meals to Albie (Sachs) during ninety-day detention in the Wynberg police station, etc, and smuggled a message into the chicken thigh. So I chaired that [Civil Rights League] and then I chaired the Western Cape Institute of Race Relations after John Kane-Berman rescued it sort of. But I then fell out with him and I resigned from the National Council. But I also chaired the Society for the Abolition of the Death Penalty in the Western Cape, and through that got close to Sir Richard Luyt and the late Archbishop Selby-Taylor, etc, etc. So I'd been involved in a screed of those kind of things as well. And that's really...I would, if there had to be a label I would call myself a social democrat. So when, you know, remarkably, everybody got out of jail on the second of February, and political activity freed up, I came back here.

- Int But you were expecting this, weren't you?
- HC No.
- Int No? Given your involvement in the late eighties, would you have thought that...?
- HC Well, I wondered...I stayed on after the January Harare meeting for a week longer to look around Harare, staying with a former student of ours there. And, you know, when everybody else had flown back and no action had been taken against them, I wasn't scared coming back, and then meeting again. But still, I was on holiday in the Eastern Cape ...and I was in Graaff Reinet when I heard the news that this was happening. And we drove back to be on the Parade when (Nelson) Mandela was released on that Sunday. And I honestly didn't expect it, no.
- Int Your memories of that Parade, and (Nelson) Mandela's release?
- HC Well, being...you know, I mean, an extraordinary sense of freedom and glorious celebration, and then, you know, it kept on not happening. And then, you know, I was almost, with friends, moving off the Parade, when he suddenly appeared, and it was just extraordinary...and extraordinarily I've had two good opportunities to meet the man and have a long talk with him in company of others, and so it was just an incredible moment. And both my sisters had emigrated to Australia, but my folks were still alive and they had been saying to me before January 1990, you know, we really think you should move. But I was unattached at that stage. I now have...we now have five children (*laughs*), aged between eighteen and four, so I'm...almost all of whom are born post apartheid and all of them after 1993, so I'm totally, utterly South African and committed, and want to go nowhere else, neither does my wife. Even more strongly than me, so...so there we are.
- Int And then your involvement in terms of the Bill of Rights?
- HC So then in the Bill of Rights, I invited Albie (Sachs)...Albie (Sachs) gave his first lecture, after returning to South Africa, to a meeting I organised, just up on the upper campus, in about April/May, 1990. And then I can't remember the details of it, it's all actually in here [*gestures to a filing cabinet in the office*] because somebody kindly arranged it all, and then letters and all sorts of things, which I haven't had time to look at. But I knew Fink (Haysom) very well because he was NUSAS president and a year below me at university...in the law faculty here, just because he'd been and done all his other things. But I was stunned, a little bit, when I was invited to be part of this technical committee...

Int Why were you stunned?

HC Well, I just didn't think...I mean, I wasn't an ANC member, in fact, I know I was nominated by the ANC; Zola Skweyiya nominated me. But that committee of four...it was five...was remarkable because my close colleague, Lourens du Plessis, had been nominated by the Concerned South Africans Group, which was the leaders of the Ciskei, the Transkei, and the Conservative Party. Even though he was a member of the ANC and was a signed up member. Zac (also spelt Zak) Yacoob was on it, as the ANC rep. The government rep was a senior civil servant, Gerrit Groenewald, who was remarkable, because even though he'd gone into the civil service straight from school, he refused to bow to Kobie Coetsee's pressure. And the fifth member was a woman called Sibongile Nene, who was a social worker, or something like that. She was the IFP rep, but she was completely out of her field and she didn't attend many meetings, and then when the IFP left the negotiations in the middle of the year...so we were summoned in early May 1993. And we were told our fundamental rights during the transition committee, was told to identify those rights which would be key to a process of political transition. Full stop, kind of thing. No idea of...no critically...no hint given as to how long the transition should be. So we convened in what is now the Newlands Sun Hotel, here on a rainy May, early wintry evening, the four of us, and Zac (Yacoob) and I took it in turns to name rights, just to name them, that we thought would be key during the transition. And we came up with that list, and I remember bumping in to Arthur and the...okay, Fink (Haysom) said to me at that very first meeting, you guys won't be busy for more than six weeks and the transition is going to be six months. And that was the ANC view. Of course, the Nats wanted the transition to be ten years and the IFP wanted it to be sort of forever. So there was that key tension there. Which was resolved by the agreement on sunset clauses and five years, etc. But the ANC wanted a minimalistic Bill of Rights, or as Lourens (du Plessis) in his chapter in our book calls it, an anorexic Bill of Rights...not a great term, and I'm a co-author. So whereas the others wanted them as extensive as possible. So this was a kind of a compromise position. But I remember bumping into Arthur in the passages of the World Trade Center and he said to me, with some sarcasm, he said, have you reached a hundred yet! Because we'd named thirty or twenty-eight rights, which we thought were...including two that I put there, and I unashamedly say so, they're the right to administrative justice and the right of access to information. Because one of the things that we were reacting against was the closed secrecy of apartheid, the official secrecy of the apartheid state. And the lack of bureaucratic accountability. And it was a kind of a never again feeling. I'd also organised that workshop that I referred to, in February '93; that I've often thought, accounts for my presence on the committee. Because it read like a who's who of the left...there were about a hundred people present, and Zola (Skweyiya) spoke and Arthur (Chaskalson) was there, and Penuell (Maduna) was there, and Fink (Haysom) was there, and Kader (Asmal) was there, and Dullah (Omar) was there, and Bulelani

Ngcuka was there, etc, etc, etc. And it was a focus on...John Hlophe was there, he gave a great paper. It was a focus on the future of administrative law in a post apartheid society. And Etienne (Mureinik) was there, and we drafted the...it was held at the Breakwater Jail, so it was called the Breakwater Declaration. And twelve years later everything on that declaration had been achieved in South Africa, which was remarkable. So Arthur made that rather sarcastic remark, and we...the politicians kind of, you know, said okay, and then we went through and that's...we went through our eleven progress reports and we started fleshing it all out, and it was an extraordinary...I'd just got married in February, and my wife was pregnant, our son was born at the end of the year, and so I was flying out for two, three days of the week, so it was really tough for my wife, but it was just this extraordinary...I just feel so fortunate, it just happened, I don't feel there's any sense of deservedness about it, it just happened and it has been the foundation for a hell of a lot that's happened since.

Int Absolutely. It's been so important and it recurs...

HC Ja, it does.

Int I'm very curious, I've been asked to interview you not just about the Bill of Rights but also your observations; and I'm very curious about your observations of the...the Constitution making process and what you think of that process?

HC Well, firstly, I think it's really important that it was a closed process. It was incumbent upon the political...the groupings, the twenty-six, twenty-seven groupings present, to take the word out to their constituency, and to the media. That was done in relatively good and poor ways, by many of the constituencies. There was a...do you know Richard Spitz with Matthew Chaskalson's book called *the Politics of Transition*?

Int I've heard of...

HC So Wits University Press 2000. That has got the best description, and when it came out of my involvement in many ways, and I say that only because I do feature quite large in the Bill of Rights stuff, and I wondered how they'd got it so right and then I...I remembered that Richard Spitz had come to interview me in my early days as dean, and it was a blur that whole time here, and I'd forgotten he had. But Richard writes about a...CALS was holding the annual judges' conference in July and I was invited, and Dennis who's my friend, and then director of CALS, invited me to speak to update everybody on the negotiations. And I was met with the most vituperative, undermining, destructive criticism. I felt like I was an outcast. And it comes through in the...people were angry at being excluded. Many people felt...and I

understand completely so. Why is Hugh Corder sitting there? Why is Lourens...I mean, Lourens and Zac and Gerrit Grove weren't at this conference. I was there. So I was the target for people...John Dugard wasn't there [at the negotiations], you see. I mean, Etienne (Mureinik) was there through the DP, (Halton) Cheadle was there. (Halton) Cheadle had been in Harvard or Columbia or whatever. (Halton) Cheadle came in as the rep of...Halton came in as the rep of the SACP. He was with the SACP. And people find their ways and means of getting into the process. But I was on a committee, which by that stage was one of the only two remaining technical committee, because Arthur's committee, as I call it, and our committee, were the only two left, because the rest had done their work by...this was mid July. So people were very angry at being excluded, and I completely understand why. There were many people who deserved to be there who were not included. So...but I do fundamentally believe that without the relative closed nature of the process, deals would not have been done. And I have in writing, and frequently orally, called it a contract of compromise. It was a contract of compromise, it laid the foundation, of course, for the final Constitution, which is a much less compromised document perhaps, even though I would say that the Interim Constitution...and every now and then I read it again, because I have to write something about the history...even though, you know, I think the Interim Constitution overwhelmingly reflected the wishes of the liberation movements, rather than the status quo. But the final Constitution of 1996 is the Constitution of a free South Africa, which is why when all the people last year started...the ANC leadership started saying, what's this Constitution, and let's start undermining it, you know, I get very angry about that. So...I think that the atmosphere, I think that the role of what was called the Fac and Manie show, you know, Fanie van der Merwe and Mac Maharaj and Colin Eglin, and others, on that little planning committee, on the management committee, or whatever it was, that kept the show on the road. They were extraordinary people, you know, they really bashed people's heads together. People used others there whom they knew in order to put their arguments, for example, a sexual orientation bit is there, because Edwin is a close friend of mine and because Edwin spoke to me. And then there was a guy called Kevin Botha, who was running something called the Equality Foundation of South Africa, which is again a Gay and Lesbian equality organisation. I remember a long telephone conversation with him in the...I never met him...in the World Trade Center and I then went to the committee and we'd originally said, no unfair discrimination whatsoever on any ground. Then the politicians said to us, but where...you haven't outlawed race, sex, and gender discrimination. So we had to start listing. So when we started listing, that's when Edwin phoned me and we had these conversations and I said to the guys, I think we should put sexual orientation in there. Lourens (du Plessis) and I used to fly up together and down together, and I got him on my side already. Zak (Yacoob) knew, as the ANC, he went and cleared it with the ANC. Gerrit Grove said, the minister is not going to like it but I...you know, I'm happy with it. So it's there. So there was that extraordinary privileged role that one had. So it really was like being at a birth of something truly remarkable.

Int What were the challenges? It sounds so smooth but I'm sure in retrospect...?

HC Oh, there were major challenges. For example, we were left to work more or less on our own until the agreement between the Nats and the ANC that it would be a five-year transition. And then in order to control us, in the middle of the year something called...we were called the technical committee on fundamental rights, and the ad hoc committee on fundamental rights was constituted. Tony Leon, Halton Cheadle, Penuell Maduna, etc, etc. And that committee then worked in tandem with us, and we were apparently still the technical advisors. And you know, calling us the technical committee is bullshit frankly. Each of us had our own political views. We did have certain technical knowledge but we each had our own political views, quite clearly. So the ad hoc committee worked in tandem with us, and whenever there was a major political disagreement, whatever they came up with as a compromise, so a particular formulation, because then we were on formulations. And one of them was to do with the administrative justice clause section 24, under the Interim Constitution. That they more or less drafted...or together with us, but they decided what the final format should be. That was a major challenge. There were kind of, what you would call, jurisdictional challenges. For example...and I took a chance in this, and I was put roundly in my place...I thought, if you're dealing with a Bill of Rights, you've got to look at the enforcement mechanisms. So in one of our earliest reports, there was a section on enforcement mechanisms, which I wrote. Enforcement mechanisms means the court. So two things, one was...I wrote a draft chapter talking about a special constitutional court, and also how you appoint judges in the Judicial Service Commission. And it was attached to our...or I don't think we even, I can't remember whether we actually published it as one of our reports, but it circulated anyway. Arthur came to hear of it and saw it, and said, this is not your...we are the constitutional committee, it's not for you to start writing the chapter on the judiciary and how you appoint judges. Thank you for the draft, we'll take it over. Okay. But the JSC, and I'm...I don't care, you know, because the JSC...I'm not saying it's my idea, because it existed, but I think...and not having looked at the history of their drafting, I think that they hadn't got to the judiciary yet. And the JSC, as it eventually appeared on the Interim Constitution, was more or less, as I had proposed it. And, you know, we got into a lot of difficulty with...from the existing judiciary, which was annoyed at the time by the proposal that there be a Constitutional Court. And the then Chief Justice, Mick Corbett, who had been a friend of my father's and been in the war with him, etc, and at our family dinner table, he was an immensely decent and wonderful human being, and he was the first judge inside this country, 1975 already, to propose a Bill of Rights at a conference here at UCT. And...1978...I can't remember, something like that, in the second half of the seventies. He wrote on behalf of the judiciary, a relatively angry letter to the technical committee, saying why is it necessary to have this court, etc, it will become politicised and all the typical arguments. And also – we've had this out – but Carmel Rickard wrote a column at that point and the judiciary got very angry about it, and she blamed me for leaking a document,

a letter from (Mick) Corbett, in fact, to us, and it hadn't been me. And so I didn't speak to Carmel (*laughs*) for about two years after that. So there were...so the closed nature of the transition also, you know, had its negative sides. You probably want to ask some questions, otherwise I'll rabbit on endlessly.

Int No, no, it's fascinating the insights you have, thank you, that's really helpful. It's interesting that you had thought about the appointments of the judges.; when it really came into play what were your observations of that process and the interviews and the nature of the judges who were chosen, etc?

HC Ja. Well, let me just say that one of the things...I'd been on sabbatical in 1991, I'd been out of the country, and there were two major projects. One was administrative law reform, and Albie's Centre for South African Constitutional Studies (*South Africa Constitution Studies Centre*), or whatever it was called, in London, published that as a little booklet, called Empowerment and Accountability, it's a hundred pages long or so. But the other major thing I looked at, was the appointment of judges. And I published a long article in the *Stellenbosch Law Review*, which surveyed about, I don't know, fifteen or twenty countries, and their methods of appointing judges. And that was 1992, so I had this all in my mind so it was easy for me to write that. The way the JSC worked, when it did its first interview, I in fact was in Florida, in Gainesville, doing a month's lecturing there, with my wife and our young child. And I had nominated Kate O'Regan before we left, and I remember getting...it was sort of pre-email days...was it? No, maybe...it was very early email days, getting (an) email from Kate saying that she'd made it. Dennis (Davis) was very angry with me because Wits was pushing June Sinclair. I mean, I didn't see it as a Cape Town/Wits kind of thing, but Kate (O'Regan) was, you know, appointed and I...you know, I think everything...I'm not saying anything negative about June (Sinclair), but everything has indicated what a successful appointment that was. I thought it was a wonderful extraordinary Bench. Albie (Sachs), once he and Kate(O'Regan) had been nominated, in about August that year...or whenever it was, September, it was shortly before I went to America...was very anxious and absolutely desperate to get onto the Court. And he said, Hugh...he phoned me up and said, "would you do a mock interview with me?" And would you ask Kate (O'Regan) if she'll be part of it as well? Kate (O'Regan) said, she wasn't prepared to be mock interviewed, but she would be on the panel with me interviewing Albie (Sachs). So in our living room, in Rondebosch, on the one Sunday afternoon or whatever, we had Albie (Sachs) sweating. Because we said, what about your...why didn't you write a dissenting report on the ANC human rights...because we knew that was going to come up, human rights violations in the camps, etc, etc, etc? And it was an extraordinary afternoon. It lasted two or three hours, when Kate (O'Regan) and I, you know...he said, be as devious and evil as you like. I was completely delighted of course that he got on.

Int Do you think you prepared him for the JSC interview?

HC I don't know, I think it helped. Because...Etienne Mureinik was a very, very close friend of mine, and I knew that Etienne (Mureinik) would ask those kind of questions. I mean, Etienne's (Mureinik) death robbed us of all sorts of things. It robbed us of one of the major thinkers in the area of administrative law, if not the major intellect in that area at that stage. It robbed us of a wonderful rep on that JSC (Judicial Service Commission). Because the next rep who went on was John Milton and then a guy called Neethling from Unisa. And the academic has not really played a significant role since Etienne (Mureinik). Etienne (Mureinik) fought for, after those initial open interviews...remember they tried to go closed? And I've got the letter...the correspondence, I've got a copy of the correspondence that Etienne (Mureinik) wrote to (Mick) Corbett, because Etienne wrote in the *Mail & Guardian* in December 1994, a very critical treatment of the JSC intending to get closed. And Corbett wrote to him, a very angry letter for Corbett, extraordinarily angry letter saying, you have betrayed the trust, etc, etc, that we had in you, etc, and Etienne (Mureinik) then wrote a twenty-four page letter back, which I've got somewhere. You know, if at some stage you need, I'll try and track it down. But I think the JSC (Judicial Service Commission), if you want an answer for the first fifteen years...well, (George) Bizos, Kgomo Mofokeng, Moroka and John Erntzen, and whoever, I can't remember the four...who were the four Mandela nominees as the independent presidential nominees...while they remained on, until Zuma replaced them in July 2009, I think the JSC (Judicial Service Commission) did as pretty damn fine a job as it could. I think particularly George Bizos' presence there as an ANC heavyweight, sort of kept the Parliamentary majority in line, if you like. I think the JSC (Judicial Service Commission) has destroyed itself by its inability to cope even with the drunk driving judge (Nkomo Motata) and of course with the Hlophe issue. I think that it's for that reason that I think John Hlophe and his alleged misdemeanours, both with Oasis, I mean, I think the JSC (Judicial Service Commission) really blotted its copy book, even on the Oasis stuff, that has even more so now over the Constitutional Court complaint of May 2008. I am, also, as you probably know, I'm a Director of this organisation, NGO, called Freedom Under Law, which Johann Kriegler heads up, and part of the time I feel I don't want to be part of it anymore because it is so enervating and so difficult and because I appreciate the strongly held point of view that many people have to say, let this thing go now. Many people argue that. The current Chief Justice, I think that's his point of view. I think to a certain extent, Sandile Ngcobo felt that. Let it go. There are judges on the Constitutional Court, I know they discussed it within the last couple of years about whether they should just drop their complaint against Hlophe. The majority feels that the thing must run its course. But I feel very strongly on rule of law grounds that if we...the Chief Justice of the Transvaal that President Kruger fired, Chief Justice Kotze, in 1897, in his judgment, for which he was fired, said, if you allow little transgressions of the Constitution to happen, cumulatively over time, when the big bang comes, you've got no leg to stand on. and I feel really

strongly about the JSC's inability to confront the Hlophe issue...the majority of the JSC, there was a minority on each of those. I think on the appointment side, it has largely got it right. I think that the, to a certain extent, there have been some very disturbing trends from July 2009 onwards. So, you know, the four judges who were appointed in October 2009, you know, I mean, there's a point that I keep on making because not enough people I think are making it. The fact that the JSC recommended (Chris) Jafta, to a certain extent indicates that they believe his evidence against John Hlophe, and not John (Hlophe)...because they didn't even shortlist John (Hlophe). They didn't even discuss him, I understand. He was interviewed but he wasn't shortlisted. (Chris) Jafta was shortlisted and appointed. And the fact that he's a Constitutional Court judge indicates to me that the JSC (Judicial Service Commission) actually is saying to the world out there, we believe (Chris) Jafta's version of events, not (John) Hlophe's. But, you know, John (Hlophe) continues to be the Judge President, and most recently was a member of the JSC (Judicial Service Commission) appointing judges. So I think the JSC (Judicial Service Commission) has really gone into serious malfunction, since mid 2009, to be honest. And I don't think it's got to do necessarily with the structure, I think it's got to do with the ANC party line whipping their effective ten representatives into line. And sympathetic members of the...who represent the advocates and the attorneys and others. That seems to me the pattern.

Int I have lots of questions to ask you and I'm aware of the time, but I'm going to ask...

HC I've got ten, fifteen minutes or so.

Int Okay. You've written very strongly about the respect for the Constitution...

HC Ja.

Int I wondered whether you could really talk about this and your perspective... and what you'd like to be in your oral history?

HC Ja. Well I think that the...I think that the Constitution, the strength of the Constitution, comes from the extraordinary inclusiveness of the process. Both first time around, and second time around. By the spirit of never again, which pervaded all the discussions. In the second time around, in the final Constitution, I was the convenor of the technical support for theme committee one. Which didn't have a huge lot of important things, other than traditional leadership and the secular Christian state issue, were two big issues...and the languages, etc, etc. But I was out of it for most of the other stuff, but there was...the public participation programme was real. So it was the inclusivity, it was the never again principle, it was the sense of compromise, and it was

unashamedly borrowing the best from the lessons learnt from other constitutional systems. And in my experience the successful transplants came not from the Americans, who tended to come and lecture and say, you've got to do it this way, as they did in Central and Eastern Europe. But from the softly-softly, the Germans and the Canadians and some others, and the Europeans generally, who came along and said, well you might like to come and see how we do it, come and have a look. So the Constitution I believe...I mean, I think that there are areas in which it can be strengthened but I think that...many people asked what happened to those thirty-four constitutional principles? According to the final constitutional draft. They're all there in section one, the values section of the Constitution, as far as I'm concerned. That's my line. And that's a seventy-five percent majority to amend it. And that indicates its privileged status. And I think that the set of values, which include the rule of law, which include non-racism, non-sexism, include the supremacy of the Constitution, which means the Constitutional Court is king, King Arthur and his Round Table, beautiful round table in the Constitutional Court, is for me...it's what holds us together and gives us the possibility of a non-racial future. I have no doubt it's going to take generations. Interestingly enough the controversy surrounding Mogoeng Mogoeng's nomination, for the first time since 1994, witnessed black and white lawyers...NADEL made a critical statement for the first time since 1994, in my experience. I was a member of NADEL and involved with it here in the Western Cape. I met somebody just before Christmas, EB Mohammed who'd been involved in NADEL in the late eighties and I didn't recognise him because he's gone all white and I hadn't seen him for twenty years but he recognised me, and we had a nice chat. NADEL came out and was critical of Mogoeng. And that for me...and (Sandile) Ngcobo, also let me say to his enormous credit, because we all have flaws and he has them too, he had a vision for running the judiciary as a separate independent branch of government, and for the first time...I did a lot of consultancy for Parliament through Frene (Ginwala), mainly as Speaker, in that first five years. From the Thabo Mbeki presidency onwards and throughout it, I was never asked to do a single thing for any aspect, and that's fine, I was the Dean at the time, and I didn't have any time. But (Sandile) Ngcobo asked us to do a massive amount of research...there's the pile of documents there which is the product...on comparative systems of running a judiciary. Whether the Chief Justice should be the head only of the Constitutional Court or of the judiciary as a whole, etc, etc, etc. It was fantastic being involved again. And that aspect plus the non-racialism or the relative non-racialism of the response to Mogoeng, because the BLA didn't. They backed him. To a certain extent makes me feel less pessimistic than sometimes I have felt. But I return to what I said earlier, I'm here for the...often I've said, the struggle continues, and I know it's a cliché but I'm here for the solution not as part of the problem. Because I do believe that on the basis of the Constitution...and let me also say, that I'm...one of the projects...I'm on sabbatical from now onwards until June, is to write an article responding to...there's a guy called Lewis who wrote an article in the Law Quarterly Review in London in 2009. He's the son...Jonathan Lewis I think is his name...he wrote a...he's the son of Carole Lewis who's a judge...who was

at Wits, as a professor and who's a judge at the Supreme Court of Appeal. [Jonathan Lewis's article in 2009] Very negative and I think destructively critical of the work of the Constitutional Court. Jeremy Gauntlett last year, 2011, at the Law Teachers Conference made a speech in which he said that academics had been not critical enough of the Constitutional Court. I got a couple of research assistants from last year's final year at UCT here, to trawl the journals of the last fifteen years. There's been this much critical stuff written, masses, of the Constitutional Court. But when I had to give a memorial lecture in Australia at the Australian National University, November 2009, I chose...it's called *On Stormy Waters, the relationship between the Executive and the Court*. Or the three branches of government in South Africa. So it's a separation of powers issue. I am an unremitting, if that's the right word, fan of the Constitutional Court, until fifteen years. I'm not necessarily saying anything about the last two and a half, but I think the Constitutional Court navigated those stormy waters, held the line on constitutional supremacy and the words of the Constitution. But did so with a considerable degree of political nous, common sense. And I think that what has happened subsequently is that...and I've written an interesting article which is going to be published in Australia this year, called *Building a Nation*, and it compares the role of the South African Appellate Division 1910 to 1925 with the South African Constitutional Court 1994 to 2009. The first fifteen years of each of them. And the nation building project...and I've got Neville Alexander's book in my mind, *One Azania, One Nation*, as I speak...the nation building project of the AD in 1910 to '25 was building a nation of white people, but Dutch and English speaking, who'd been fighting each other in the war eight years before. The nation building project which I decipher in the work of the Constitutional Court, is most obviously there in the *Azapo (Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others)* judgment of Ismail Mahomed. But in a number of other judgments that I detail in that. And I think there's a fantastic and fascinating parallel to be drawn, between those two projects. And I think the Constitutional Court has done a fantastic job in those first fifteen years in nation building. I think things are beginning to unravel a bit now and we're going to see many more 6-3 or 5-4 majorities. I don't know which way they're going to go. I don't know which way they're going to go sometimes. But I think, for example, on socio-economic rights, I'm not with Jackie Dugard and others who come steaming in and saying, you know, you've got to sort out the water issue, etc. I'm not...Pierre (de Vos) and others know a lot more about socio-economic rights than I do. I'm much more on the role of the judiciary and judicial politics and stuff like that. But I think in that area they've done a fantastic job.

Int What do you think of Theunis Roux's idea of the 'Chaskalson Court'?

HC Just remind me of exactly the way that he put it. Because I've read it, I've read it for that article, but it's now two, three years ago.

Int In relation to... he seems to almost suggest that the Court is a politically canny bunch, as such?

HC Ja. I have no difficulty with that at all. I think they have to be. I think that's part of the success of the Court. That they know where to step over the...I think if you feel politically connected and politically confident, as Albie (Sachs) and Arthur (Chaskalson) and Zac (Yacoob) and Ismail (Mahomed) and John Didcott and even Johann Kriegler. It's a range of political opinion there but you feel connected and confident. Then you know where to put yourself, and I'm not excluding Yvonne (Mokgoro) and Kate (O'Regan) and everybody. I think when you feel...and I don't think that any of those people felt politically beholden to the executive or the legislative. Arthur (Chaskalson) wouldn't in my...I don't know him well enough to... . I fear a feeling of political beholdenness, if that's a word, in some of the more recent appointments. And I don't have the same sense of judicial confidence in their own ability to know where to walk the line. So I wouldn't, you know, in Theunis' (Roux's)...ja, I remember...I wouldn't...doesn't worry me. And not because it's my politics, because it's not always my politics, you know, it's often not my politics.

Int In terms of the transition to democracy in the role of the Constitutional Court, what were the challenges then, and what are some of the challenges that remain?

HC I think some of the major challenges were making the existing legal profession, plus the Supreme Court of Appeal, accept that funny bunch in their green dresses up in Braamfontein. I mean, that has come clear again...in fact, I'll give you a copy of this *Building the Nation* thing, or I'll email it to you. I'll email it to you because you may be just be interested and it's in draft form, it hasn't been published yet, but you may be interested in that, but I refer to that. There was a lot of professional jealousy, there was a lot of undermining by the Supreme Court of Appeal, by the old guard there; I think that's gone...you know, it's gone now. I think people have accepted the Constitutional Court.

Int What about the tensions during the time when Ismail Mahomed was...?

HC I wasn't sufficiently inside to know about those tensions. I can imagine the personality tensions that...I know (John) Didcott thought that both...I think he thought that...I think he was more tolerant of Ismail (Mahomed), I think he wasn't very tolerant of Albie (Sachs), I understand. I mean, if you talk to Dennis (Davis) about it, Dennis (Davis) always remembers these anecdotes, not I, but on one occasion he more or less said to counsel, ignore that last question asked by Judge Sachs. I mean, (John) Didcott was outrageous in Court. But he was a very fine judge and, you know, he never hanged anybody in this country. So the personality...I mean, I think that's part of Arthur's

(Chaskalson's) success as Chief Justice, is that he kept that court together. I think moving Ismail (Mahomed) to be Chief Justice was...Ismail (Mahomed) was very unhappy about it. I know that, because again, Dennis (Davis)...he spoke to Dennis (David) at length about it and Dennis (Davis) has told me about some of those stories. But I think Ismail (Mahomed)...I think that that may have been a marginal benefit, and...but you know, you've still got tough characters on that court. I mean, Zac (Yacoob) is a...whom I know very, very well, is a very independent minded person. So is Edwin (Cameron) . And there are a few others who...ja.

Int I mean, it's curious, even with that...the strong personalities and the varied backgrounds that they came from, that first Bench in particular, there was an enormous sense of collegiality. ..

HC There was an enormous sense of collegiality. And that is a complete...that's why I think it's a completely remarkably success story, and you know, *Makwanyane (S v Makwanyane and Another)* was deliberately chosen and it's a complete tour de force that set of judgments. It's really important that each of them spoke, as well as all of them concurring in the majority view. I mean, I have quite often feared that the Constitution would be amended to perhaps reintroduce the death penalty, therefore for me, you may not have been around but they've made now a museum called the Gallows, in Pretoria Central, and for me that's a hugely significant step. They did it in order...(Jacob) Zuma was there...they did it in order to celebrate the freedom fighters who'd been hanged. But it doesn't matter. I don't care what the motivation is, now that has been memorialised in a museum format, and that for me is a source of hope.

Int Do you have any concerns, given the nature of this first Bench, almost in some ways being typecast as this 'Glory Bench', do you have concerns about the future of the Constitutional Court for the public life of South Africa?

HC Ja, I certainly have concerns, ja. And they relate to that most recent group of appointments; not all of them. They relate to the willingness and the leadership of...I mean, you know, again for all his faults, I think Sandile Ngcobo, an extraordinarily hard working, great intellect, and I think, and I...you know, one is not allowed to say that lots of graduates of this faculty have ended up working as researchers in the Constitutional Court, and one or more of them, over the past two years, have said to me, that they have absolutely no reason...had absolutely no reason to doubt (Sandile) Ngcobo's independence of spirit as a judge. Because people have questioned that. I don't know, I just don't know because I've never met him, whether the current Chief Justice shares that but I have very, very strong counter indications. And that is of concern because he's going to be influencing indirectly, if not directly, who gets appointed to fill the vacancies that are going to arise. Zac's (Yacoob's) got eighteen months to go. And so on and so on and so.

- Int What do you think have been the failings of the court, if any?
- HC One of their very first failings was not producing a media statement along with their judgments. When the death penalty decision came out the press had a field day. They misunderstood it left, right and centre. And now, you know, I'm not claiming responsibility but I wrote to Arthur (Chaskalson) and I said, I really thought that it was vitally important that there should be a media statement. I understood the reasons why not. And he wrote back and said, we've already thought about this and it will happen from now onwards. I think that public...ultimately the legitimacy of any judiciary depends upon the public confidence in it. Or the survival of any judiciary depends upon its public legitimacy. And the Constitutional Court has to engage directly with the public. The only way they can do that is the communication of their judgments, and they can't actively cultivate the commentariat, but...you know, the academics and others, but, you know, if their work is of sufficient quality...that's why I've often felt duty bound to comment favourably on the work of the Constitutional Court, because they are an incredibly important bastion as far as I'm concerned, in making sure that the Constitution remains central...central authority in government.
- Int Hugh, I have lots of questions...I must thank you for making a distinction in your work between the rule of law and the rule by law. Because that appears so much in my previous work on the LRC, that distinction, and I think I've learnt a lot from just reading that, so thank you for that. I have a lot of other questions and hope I'll get to interview you again.
- HC Good, I'd happily do that.
- Int I'm wondering for now, if there's something that I've neglected to ask you that you'd really like to include?
- HC No, I mean, I'm sure that there's a lot more that I'd like to say at some future stage. So if you either want to send me emails or we can talk over the phone, or if you're back here, I'd happily talk more if there's anything of great interest. I mean, one of the things that I am completely passionate about is teaching. Now, I did ten years of Dean and I didn't teach and public instruction on the Constitution and stuff like that, it's gone. The people don't understand the Constitution, they do believe when (Jacob) Zuma says, Constitutional Court judges...as he said in the interview in April 2009 before being elected as president...think that they're God. ANC quickly covered up for him, the spin-doctors came in, but I think he thinks still in a majoritarian kind of way, and he sees the Court as a counter majoritarian institution. And that's hugely dangerous. And unless the people...so public education, but then I've got an opportunity without preaching, you know, to...we get frankly, in some ways,

the cream of the crop of law students at this faculty, and they're wonderful, wonderful people and they again give me hope, because they're from every race and many African countries as well, and they're good people.

Int Thank you so much.

HC It's a pleasure.

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