

Heinz Klug Constitutional Court Oral History Project
14th December 2011

Int This is an interview with Professor Heinz Klug and it's the 14th of December 2011. Heinz, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

HK You're welcome.

Int I wondered whether we could talk about early childhood memories in terms of where you were born, a bit about your family background and your experiences. or formative influences that may have influenced you in terms of social justice and human rights.

HK It's a long...I mean, it's a complicated one, so I don't quite know where to begin. I was born in Durban, my father was an immigrant from Germany; my mother's family, I think she was born in Johannesburg, but her family goes back away. Her mother's family came from Mauritius at the turn of the century to Durban, and her father came from the Transvaal. And there's a lost history there but it's quite clear that the family were somewhere in between. And so there were issues, as my mother was growing up, there were members of the family who were a little darker, and there were members of the family that were a little lighter. And on my mother's side, both my mother and one younger brother were...in the late forties, early fifties, pushed out of one public school and had to be taken to another school, and effectively...I've tried to trace it back and I don't know what the story is, but...somebody was passing somewhere along the way. But I grew up as a white South African. My mother met my father on a bus in Durban and he fell in love with this beautiful woman, he'd just arrived from Germany, I don't think he'd quite got the code of the society that he arrived in yet, and he was embraced by the family, and so I grew up as a white South African, with a father whose family were German, who'd grown up as a child during the Second World War, but his family were social democrats. The kind of social democrats who hid under the bed in the war, and didn't actively oppose, but were petrified by their experience. And so what was interesting, when I think back to formative experiences, I ran into a little bit of the, "you're the wrong colour to be on the beach" kind of stuff as a kid, but I didn't understand it, it didn't make any sense. But my father was constantly fearfully complaining about the direction of... the world he was now in. Not in a particularly progressive way but just that he didn't like the authoritarian nature of the world that he was now living in. And those were, I suppose early influences, in that it created an interest in the news and interest in what happened around, Mine was a working class family. He was a locksmith, my mother was a bookkeeper in a bank, and then in the late sixties they purchased a small firm that my dad worked in as a locksmith, and they ran 'Natal Locksmiths'. So that's how I grew up in that

place. And it was through a group of friends in school who began to question and eventually I got into Natal University, and I arrived there in 1975. And there was a bit of activity on campus, and I got engaged in that activity, in fact I was elected to the SRC (Students Representative Council) in April 1976, and of course in June 1976 there was the uprisings. And I became an activist and didn't turn back, didn't look back from that, and was active on Durban campus, and became a founding member of SASPU (South African Students Press Union), when SASPU (South African Students Press Union) was first formed. I was the second president of SASPU (South African Students Press Union), and that just kept on going. In 1978 I was in London and through a person there I met with the ANC, with somebody in the ANC, and so had made the connection and the following year I ended up basically going into exile in Botswana. And I was already an ANC activist and remained so.

Int I wonder whether I could take you right back, when you speak about your dad being very resistant of the authoritarian nature of the country that you were growing up in, I wondered whether you could talk a bit about what it meant to actually have political discussions, if at all, at home?

HK They weren't explicitly political. He was German and had grown up in an authoritarian society, and believed very much in the hierarchy in the home, where we had to keep quiet while he listened to the news at mealtimes. And he would talk back at the radio. That was the experience (*laughs*), was his unhappiness with the news being reported on the radio. So it wasn't a discussion with us as such.

Int And I'm also curious about the fact that you mentioned being told at the beach that you were not the correct colour as such. And those memories are often memories that form markers in one's mind....

HK Right.

Int I wondered whether there were particular markers that you held on to growing up?

HK You know, there probably was a range of them but it was always an exploration of why and what these things were, and I don't think it was anything particularly clear that I could say it was this moment that this or that happened. You know, I had a series of nicknames at school that averted to colour, etc., etc., because I was in this all-boys' white high school in Durban and the racism around you was very thick and deep. And in a funny way, being marked in that way...but I had no sense of identity until I started thinking about it more. So...I won't make a claim that there were specific markers that led me in a particular direction but once I was on campus and been exposed to more and more political ideas and within NUSAS (National Union of South

African Students), etc., it kind of became a natural way to go, and I think very quickly, as a young student activist in Durban at the time, you had to make choices. And for me the choices were somehow just logical, and by '76...you know, the big markers were June '76, and then what happened and very short...in the context of June '76, I was caught up in a march down at the medical school with the black students, and you just became part of that world. I realised very soon in that context that I could also flow between different communities, if I was in certain spaces people would just assume I was part of that community. And that was an interesting thing for me to begin to learn. And then by 1977, with Biko's death...so these all became, those became the markers of my life, which are the markers of so many other South Africans of that generation. And by 1979 I leave to Botswana and I worked in Botswana with the ANC from 1979 till 1985.

Int In terms of intellectual development, where do you think...in terms of newspapers and other literature, did you have access to a sort of a political understanding or conscientisation early on, before you even went to university?

HK I don't believe so. You know, the daily newspaper in Durban wasn't exactly doing anything different. That would have been in the house. But there weren't much in the way of political books or anything like that in the house at all. Encyclopaedia Britannica was the reading in the house. Again my father was German speaking. English was a language he had to teach himself. And so reading wasn't really central to what we did. I read books that I picked up at the local library, but again, they wouldn't have been political.

Int I also wondered, when you went to university, was this the time when Rick Turner was there and...?

HK Rick Turner was there, there was Eddie Webster...

(interview resumes after a brief interruption)

Int Heinz, we were talking about the presence of people like Rick Turner at the University of Natal campus.

HK Rick (Turner) was banned, I believe already in '75, which was my first year, so it would have been one of the things that happened. So I didn't ever get a class from Rick (Turner). You know, the people that were still there...there was very interesting people still there, and it was only in my second year that I started doing Comparative African government, CAGA. And I did that with Jeremy Grest, and I did that right through Honours. And so that really became my intellectual base, was learning from the people on campus. I got to, in that

context of course, I did off campus, get to meet Rick (Turner) and these were the people that we looked to in that period. And yes, Rick's (Turner's) assassination was something that affected me very deeply. I was in...I think we were...when he was assassinated I was in Cape Town and we drove back and attended the memorial in Durban at the time, so this definitely affected us greatly.

Int I wonder in terms of contemporaries, if I'm not mistaken there were other people who were working on wages...workers compensation at the time?

HK In the Wages Commission, yes. Didi Moyle, who in fact dropped me off here. Fink Haysom was on campus at the time. There was that kind of...Gavin Cawthra. This was the range of people that we were on campus together with. Penny Andrews was around. So this was a group of people that became friends for life in a way as well, but that was the kind of solidarity, that group.

Int And I'm also curious, in terms of, just prior to (Steve) Biko's death, if I'm not mistaken, there was a division between the Black Students' Association and NUSAS (National Union of South African Students), and I wondered whether you were privy to some of these debates and how you may have negotiated them?

HK Ja, that's interesting because I think again that that happened probably in '75, again it was just as I was coming into it so it was already done, if you like. I developed...I had some separate contact with SASO (South African Students Organisation) in Durban, but that I developed through being on the Durban campus. And people like Alan Taylor was on the SRC (Student Representatives Council) with me, and Michael Lapsley was there on campus. So those were the people that we were having contact with, and through them I made contact with different people that I saw and that. But I wasn't...I was still a young activist at that point, it was only in '76 that I really started developing dramatically. And then I suppose in '77/'78 I became a lot more active.

Int What took you to London in 1978, was it strictly political, or were there other reasons for you to go?

HK No...well, at that point I was already politically enough engaged and active that I was seeking out the link. Gavin Cawthra who had grown up on the Bluff, in the same high school as me, he had left the country to avoid the draft and he was setting up the Anti-draft movement COSAW (Congress of South African Writers), in London, and so I wanted to see him to make contact politically. But to do that I was already under enough pressure with respect to the Security Police, because I was producing...I was one of the people who was writing for Dome newspaper, so a lot of what we were producing was

getting banned, and they were harassing us about it, but...so I wanted to see Gavin and make the link that way. But to do that, I was a fencer, and so I travelled at that point as captain of the South African university's fencing team. So that was my cover to go to London. So I made an excuse one day in London to get away from the team, supposedly to see a relation or whatever, and through that I made the contact and saw Jimmy Corrigan was the contact that I met, and who pulled me in. And so...well, the one interesting link with that, what they were interested in at that point was, could we do something around history? And so, if you look at 1979, what you'll see is SASPU (South African Students Press Union) ran a set of historical articles about a whole series of resistance moments to try and revive that history, and we ran it consistently across all the student newspapers around the country. And that was something I was doing directly in my relationship with the movement at that point.

Int I'm also curious in terms of your choice of law, was that something that had...what was the reason for that?

HK Well, I wasn't doing law. I was doing Comparative African Government, and when I left the country, the last thing I was thinking about was law, because by that point my relationship to law was to break it, right. I mean, I was outside of the law, and I ended up in Botswana and worked with the underground from that moment on, and again law wasn't centre to my life at all. We spent our lives avoiding the law wherever we were. And so, law only arrives when I get pushed out of Botswana after the...in the contexts of the military raid in 1985, and end up in the United States. And then the question is, what am I going to do now? So I went to law school (*laughs*). That's how law began. And it was a very...it was totally fortuitous and lucky in the sense that...well, my father-in-law is a professor of law in the United States, and so there was encouragement, well if you want to study, why don't you study law? If you're going to do a PhD, it's going to take you so much longer, you could study law. And I wanted to get back to southern Africa, I didn't want to stay out there, and so law made sense. And I didn't realise how much sense it would make because when I started in 1986 at law school, in the US, we were still...what was going on here from what I knew, was that we were waging a war against apartheid. Law was the last thing I was thinking of. But by the time I'd finished my law degree three years later, in 1988, the ANC had issued its constitutional principles, Albie Sachs had been bombed; I made contact with Albie (Sachs) out there to get him to write something, I was the editor-in-chief of the *Hastings International Law Review*. And in fact, I published the ANC's constitutional guidelines, together with an article explaining them by Albie (Sachs), in early 1989 in the United States. And, you know, I still continued to do what I was doing, but now I was doing it in the context of law. And so then I returned...after I graduated there, I returned immediately to Lusaka, and back to the ANC, and so now what should I do and how should I be deployed? And I was deployed into Zimbabwe and I started working with...to see Phyllis Naidoo and talk about the death penalty work she was doing at the time. And I

started making links with the ANC law committee in Lusaka and so I got to know Zola Skweyiya and in June I was transferred back into the country as a member of the ANC land commission. And I was working with Bongiwe Njobe and Helena Dolny, and very quickly became assistant to Zola Skweyiya. And so my first period back in the country was working with Zola (Skweyiya), who was chair of the ANC Constitutional Committee. And so I was a researcher and worked for Zola (Skweyiya).

Int In terms of your exile experiences, I wondered whether you could talk a bit about that and some of your memories of that period?

HK Well, that's a long one. I mean, I arrived in Botswana in June 1979, and was immediately part of ANC underground structures operating out of Botswana. We took over and ran a news agency that had been set up there, and eventually turned it into something called Solidarity News Service that provided daily telexes of information from this area to Lusaka and to the anti-apartheid movement around the world. And that was our day job. And the rest of the time we were doing political work, both outside and into the country. So we were very active in trying to revive the Freedom Charter in 1980, in all the political campaigns that followed that the underground was doing. We worked very closely with Mac Maharaj, with a whole range of other people who were doing political work with the Revolutionary Council and I was just a foot soldier in that work.

Int I'm curious about the choice you made, because as a young person to have to leave one's country, and also to leave one's family, those must have been difficult choices...?

HK You know, in a way that was just...I was taking steps and each choice led to the next choice. And for whatever reason, I didn't step back from any of those choices and I don't want to claim any moral superiority about why I made some choices and others didn't. But I was committed to, at this point, I abhorred the system and I was prepared to fight against it. And so, you know, being who I was I joined...I was already part of things, I didn't want to go to Europe or whatever, I went to Botswana, and because I could get a foreign passport at that point, I was able to go to the Germans and get a German passport. It gave me a status in place in Botswana. I was able to come into the country underground at one point. So I was able to actually do the kind of political and other work that the ANC underground was doing in the forward areas. And I was able to do that for quite a few years, you know, and so it became eventually in the raid in 1985, it then became impossible for me to be there.

Int And the decision to go to the US, how did you...?

HK Well, in 1982 I'd met an American who was visiting Botswana. She was visiting her sister and...my wife's name is Gay Seidman, and the Seidman family had already had links with the movement, which I wasn't aware of when I met her. But her twin sister is Neva Makgetla, who is married to Zeph Makgetla, today he's the South African ambassador to Greece. So, very quickly that family connection meant that, you know, it wasn't unusual for me to follow this individual. And Gay (Seidman) was studying in Berkeley, she was doing her PhD, and I visited for the first time in 1984, and I came back, and the pressures in Botswana were developing quite dramatically after that against all the people in the front line areas. There had been a number of assassinations and attacks. Rogers Nkadimeng was killed in a car bomb in Botswana in April. Mac Maharaj arrived in the place I was staying and literally put a bottle of whiskey on the table and said "they're going to kill you". And I said, "Well, you know, we're all here together"... (at) that point I was working with Wally Serote, he was the person I was most directly working with. He was head of the ANC structures in the area at the time. And so we agreed that I would be in and out the country a bit, SNS was quite important to us to continue to produce this information. And what happened was, I was visiting...I was off to visit...she wasn't my wife yet, but my girlfriend, in Berkeley. And I arrived there on the...must have been...it was two days before the raid happened in Botswana, and there was some confusion, because in the morning they claimed at the press conference in Pretoria, I was the one of the few names they could guarantee that they had got. And so that was it. What was I going to do now? I mean, it was clear I couldn't go back to Botswana. And the ANC basically said, well, why don't you study? So (*laughs*)...because, you know, I didn't have a law degree or anything at that point, I had an undergraduate degree and then so...so there I was stuck in America and so what was I going to do now, so I went to work as a paralegal in a law firm to survive and then went to law school.

Int And your experiences of coming back to South Africa after so many years abroad...

HK Ja, I was out for eleven years.

Int What was that like, what are your memories of coming back?

HK Well again, I came back with the movement to help set up headquarters. I helped set up the Land Commission, and was again working for Zola (Skweyiya) and helping people return. The biggest memory was I got to come back really early and one of the first people sent back, at one point in mid March, I was sent back to see people. It was quite clearly a test to see what was going on. I left the country, was sent back in June, and started to set up the headquarters that was being set up as with the Land Commission stuff. And many people were returning to the country at that point and we had a place that we where...first I stayed with people who were activists I knew in

the country from my other activities, and then we in '91 purchased a house and many, many people arrived back and stayed for a period of time in the house before going on to other places, because the community had to return. So that's the biggest memory for me. And those first few years, coming back, nothing much had changed. And it was very intense and violent and we were very aware of that. And so we were kind of caught somewhere between now becoming legal and public and open, and also facing the consequences of the fact that there was still a lot of antagonism and concern on another level.

Int I'm just curious...there was Operation Vula at the time, were you privy to any of this and that there may be occasion for you to step back as such?

HK I wasn't privy to Operation Vula. When I was sent back in March, I was sent back with instructions to meet some people in Durban and pass on some information, and it became quite clear to me later that this was passing information to people within the Vula structures. But I had absolutely no idea that Operation was in...in fact, because I'd worked so closely with Mac (Maharaj), one of the things I'd asked was, you know, where's Mac (Maharaj)? And I was told, Mac (Maharaj) is sick and dying in the Soviet Union, and I believed it, because after all Mac (Maharaj) smoked like a chimney and there are many reasons why he might have been ill. And so it wasn't unbelievable to me that he may be sick. And so I swallowed the cover story.

Int And in terms of your role in the Constitution making process, what was it, if at all? Were you involved at all in the Constitution?

HK What I did was, I worked with Zola Skweyiya and was so a researcher for the ANC Constitutional Committee. So I attended all the major conferences that the ANC Constitutional Committee ran, and I played small roles in all of those. The most public role was when the conference on affirmative action that was held in the Eastern Cape, I was the Rapporteur for the land section and publicly stood up and spoke about the fact that we thought there should be a wealth tax. And the next day we were being hammered in all the media, and I was getting death threats at home, and you know, the usual story all over again. And so, some years later when Tito Mboweni made some suggestion about a wealth tax, I got a call at five in the morning from Tito (Mboweni) saying, "I'm getting harassed, I'm getting harassed, what did you do?" (*laughter*) You know, it was that moment and that time. I continued to do research work for the Constitutional Committee for Zola Skweyiya, right through that period. But I started teaching at Wits (University of Witwatersrand) in 1991, because again, you know, there were no positions. And so I became a Lecturer in law in 1991 and started teaching constitutional law at Wits, because obviously with a US degree I'd had some exposure to constitutional law. During that period whenever I returned to visit my wife, Gay Seidman, who was at that point now teaching at the University of Wisconsin, I would

take those visits to research in the libraries there, because there was access to material that wasn't accessible here, and bring back material, whether it was on affirmative action, or land issues, etc., back here. And, ja, I would say that was the part that I got to play.

Int You've been a close observer of the Court, and I wondered whether you could talk about the early years in terms of its formation and what your sense of that was and whether you were privy to any of those early decisions?

HK Well, I don't think I was privy to decisions. I was privy to the discussion on whether to have a Constitutional Court because of my role with the Constitutional Committee, I was at the conference on the decision about what kind of court structure there should be, where Justice (Prafullachandra Natwarlal) Bhagwati was here from India, and there was, I think it was here in the Magaliesburg somewhere, that this conference was held. And so I did attend that, I participated in those conversations. I'd learnt a little bit abroad from doing research, about the distinction between a Supreme Court and a Constitutional Court and the power and role that an institution like a Constitutional Court would play, and so, you know, had those ideas as well. But whether it was my ideas had any effect or others is not clear. The one thing that I know that I was able to contribute at one point was, I was sent by the ANC to participate in a election monitoring operation that was in Guatemala, with the National Democratic Institute, the American based institute. And, you know, my task from within the ANC was, you go there and watch what the election observers do, as you behave as an election observer. And I brought that back with the idea that there should definitely be a Electoral Commission, and that was still at the moment when there was a major debate going on about whether we should have an interim government or not. And the ANC was demonstrating on the streets – I was part of those demonstrations – for an interim government and a constituent assembly. And at that point having seen the role of an Independent Electoral Commission, I made the argument to a number of people, including Joe Slovo, that maybe an interim government wasn't a good idea because we'd take on the burden of governing an apartheid country, and instead what we should do is have these interim mechanisms. And in fact there was a meeting where I was asked to present these ideas about interim mechanisms, and I remember it was Raymond Suttner who had to make the argument for an interim government, and you know, it was before the senior leadership of the ANC at the time, and COSATU (Congress of South African Trade Unions) people and the party, and I know Thabo Mbeki actually, I think, ran the meeting. And in that context I made this argument for why we shouldn't bother about an interim government, and why we should have these interim mechanisms. Other people then took and I think turned it into a very interesting set of developments, because it wasn't just the IEC (International Electoral Commission) but it was the TEC (Transitional Executive Council), etc., which in fact enabled the transition in many ways. And that is also how I came to view the role of the Court. The fact that we were going to go from an Interim

Constitution to a final Constitution, the creation of this independent body, this Constitutional Court, to enable that transition, becomes a very important part of the process, and it was that, that work that I did then that became part of my first book on the South African transition and on the Constitution.

Int In terms of the approaches to judgments that the Constitutional Court took in the early years, I wondered whether you could talk a bit about that, in terms of the death penalty case ((*S v Makwanyane and Another*)?)

HK Right. I mean, these were major and important judgments. The death penalty case ((*S v Makwanyane and Another*), obviously, given the fact that we still had people on death row was important. But it was also important as a principled issue that this was a struggle for human rights and here's clearly the most fundamental right. And, so I was at that point already now travelling between the United States and here, and so to watch this unfold was really to see the way this Court is stepping forward, and, you know, internationally, it really created a wave that said, this is a new institution that's doing extraordinary things. So I was very interested in watching that. It was also fascinating to see how the Court would begin to use foreign material. It was at that point in time the Court explicitly said, the justices explicitly said, we can use foreign material until we build our own jurisprudence and we can use it in particular ways. And it was a very interesting form of that comparative jurisprudence because the Court for instance would cite dissents from US cases. They weren't following precedent, they were using legal arguments that had been made and that made sense, and they would incorporate those into their judgments. So in many ways the Court was also becoming an example to the world of how you can use this global jurisprudence to make your own out of it.

Int There's also been criticism that the Court hasn't used enough comparative law from African countries, it's been more Americentric or Eurocentric, would you agree with that?

HK I wouldn't really, because if you look at that first *Makwanyane* (*S v Makwanyane and Another*) case, in fact there was use of some African sources, and since then the Court has moved more and more away from using comparative sources because it doesn't need to, it's got its own sources. It's built its own jurisprudence to rely upon. And I don't think it's a question of sources in that sense because they're not really using sources as legitimate bases of law, they're using them as ways to construct arguments. And they use many different things as ways to const...Ubuntu is a way to construct an argument, and a source, which they drew on at the same time. So I don't really have a sense that the criticism that it's a Eurocentric Court or an American-centric Court, I don't think would hold much water.

Int In terms of the emphasis on socio-economic rights, I wondered what your observations of those cases have been?

HK Well, I mean, what's very interesting about the socio-economic rights debate is there was a very rigorous debate in the beginning. There were no socio-economic rights really in the Interim Constitution, and so in many ways this was, as the Constituent Assembly started building the final Constitution, a recognition of what the Freedom Charter had promised, what the ANC tradition had promised, would be incorporated into the Constitution. The Court in its certification (*Certification of the Constitution of the Republic of South Africa*) judgment was very clear that these wouldn't be treated as second-class rights. That these would be treated equally with others, but that set up of course a major challenge of how do you make these justiciable and make them actually work. And you know, over the years I watched these very closely, a lot of my research has been on these rights. And what has been fascinating of course is you get the first case of *Soobramoney* (*Soobramoney v Minister of Health (Kwa-Zulu-Natal)*), a very sad case, when an individual is claiming access to a resource, a dialysis machine, which is absolutely essential to their life, and it comes up all the way and gets denied. And so in many ways there was this, oh, well, what's this going to mean for socio-economic rights? But I think the Court has slowly but surely carved out a very, very important jurisprudence that's become an example to the world. There are other courts around the world who have adopted the idea that there can be some kind of minimum core, that we can just announce rights and that those rights, somebody else has to implement them. This Court, I think, has been incredibly careful to ensure that the way it deals with rights is to make them real, to make them effective, and it's a very awkward and difficult thing for a court to do. So in the *Mazibuko* (*Mazibuko and Others v City of Johannesburg and Others*) judgment on water, I know that many activists were terribly disappointed that somehow the Court wasn't upholding this minimum core. But I actually think that the decision in *Mazibuko* (*Mazibuko and Others v City of Johannesburg and Others*) is an extraordinary decision, in the sense that it says, if we set a minimum core, not only do we set a minimum, but we're also setting a maximum in many ways, and if the state actually has the capacity to deliver more, we should be able to review this in such a way that they would have to do that, they would have to be responsive. So I think there's an attempt to create a jurisprudence that will in fact enable civil society and others, to continue to struggle for more and more content to these socio-economic rights. But it's clearly difficult, and the last thing a Constitutional Court, an Apex Court, ever wants, is to be in a position where the government of the day doesn't take notice. To be ignored is the worst possibility. And I think this Court's worked very well in trying to craft decisions that are possible and not just decisions that are principled. Because of course we want principled law, but principled law that's not possible doesn't actually strengthen the rule of law at all.

Int Just to piggyback on that, there's been a lot of debate about the outcome of the *Grootboom* ((*Government of the Republic of South Africa and Others v Grootboom and Others*) case; that Mrs Grootboom died before she got a house...

HK Irene Grootboom died before she ever had a house. But the *Grootboom* ((*Government of the Republic of South Africa and Others v Grootboom and Others*) case didn't ever promise Irene Grootboom a house. What the *Grootboom* ((*Government of the Republic of South Africa and Others v Grootboom and Others*) case said was, this is a question of policy, a hole in policy. And I think the Court has gone much further than *Grootboom* ((*Government of the Republic of South Africa and Others v Grootboom and Others*) today, it's developed its jurisprudence further than *Grootboom* ((*Government of the Republic of South Africa and Others v Grootboom and Others*). But that was the starting point. That was the starting point, which said, they can question the failure of government policy, to take into consideration this category of individuals who were in an emergency situation and were not being taken care of. Because it's no question the government had vast policies on housing, which they came into Court with in *Grootboom* ((*Government of the Republic of South Africa and Others v Grootboom and Others*) and said, look, we are doing all of this, producing all these houses. But what the Court said is, that's all very well, but what you failed to do was address this specifically emergency type situation that Irene Grootboom and people like her were in. Now again, whether that is enough, whether that solves it, is going to be controversial, but I think a court only can deal with the cases that come to it, that's why it's not the executive. A court can only address it in such a way that moves it one step forward at a time. And I think this Court has been quite successful in doing that. It's not that it's not open to criticism, like any institution it should be and will be, but I've been encouraged by these decisions, and not discouraged.

Int There's been some concern that, the moment came with the *TAC* ((*Minister of Health and Other v Treatment Action Campaign and Others*) case, where it almost seemed as if the Court was telling government or the Executive what to do, did you get that sense at all?

HK Well, the Court was telling government what to do, again within a very specific context. The Court said, the government has already got a policy of delivering Nevirapine at eight different sites. What the government couldn't really justify was, why only those sites? If there was a capacity to deliver it in other places, and that it had this...the government agreed it had this effect on mother to child transmission, then on what basis could there be to not deliver it in those cases? Remember the Court did not say that Nevirapine had to be provided to every woman in the country who was HIV positive and needed it for their children. They did not say that. That would have been directive. What they said was, this drug has been offered for free by the drug maker, granted only

for five years or whatever, and you have capacity in certain hospitals to deliver this. On what grounds wouldn't you? And in that sense it was saying, this just is not reasonable. So it was directive in that sense, but I don't think it stepped outside of exactly what a court should be doing. Should be reviewing this policy, not saying to government, you've got to do x and y, but to say to government, how can you justify not doing it in this particular circumstances when the outcomes are so important? No of course, the effect that it had on government was much more profound than just the question of Nevirapine. Because what it does, it starts to break down the whole notion that HIV wasn't causing AIDS, that you couldn't do anything about it, etc., and that drugs didn't play a role. So in that sense it was very interventionist, it was a very important case. But I don't believe it went outside of the bounds of review of the specific decisions not to provide it to more than eighteen places.

Int In terms of the issue of non-legal considerations, do you ever get a sense that non-legal considerations have come into play, particularly with regard to socio-economic cases?

HK I don't think it's only in regard to socio-economic rights. I think a court has to be and is... constantly aware of its institutional place in the whole political system and in the country as a whole. And I don't think this Court is any different. I think the justices of this Court, it's not something they can do publicly and openly, but I think they are concerned and they're very aware of the institution and the life of the institution and the role of the institution in society. And so I think it does make decisions...it is aware in its decision making process what the responses would be. And you can see it quite explicitly in some of the judgments. Judgments where the Court explicitly says they are concerned about the fact that the executive hasn't responded. They are really saying, we're concerned about your respect for this institution, and this institution's role in the society as a whole. In the same way that when it talks more broadly about history, etc., in its judicial opinions, it's talking to a broader audience than just the participants in a single case before it. So, yes, I do believe there are institutional considerations...I wouldn't call them non-legal, because I don't think that any legal institution operates in a vacuum. It operates in society, as an institution of governance, it's one of the institutions, particularly in a constitutional system that we have here that has to play an important role. And were it to lose that role, were it not to have that role, the whole system would suffer.

Int In terms of the issue of pragmatism, how do you think that judges have actually grappled with that in relation to the legal principles?

HK Well, I think it has been a pragmatic Court to a certain degree. I think they've been explicit about being pragmatic. But I don't think that that is at tension with principle as some people like to think. Simply because it is about how to make principle effective. If you have a principle to protect socio-economic

rights, you could say, well that means obviously that there has to be a minimum core, and that has to be protected under all circumstances. But if you understand from the beginning that that is never going to happen that way because there's no capacity, because in fact that Court changes over time, if you have those understandings of the delivery of these kinds of resources, then it may be pragmatic to say, well, you can take it one step at a time and in particular ways, but in fact it's also principled to the degree that what you want is that the outcome to respect these rights, and to respect the development of these rights over time. I mean, in a funny way the Constitution is both aspirational and at a bottom line protective of what you have. And it's those two things together that I think makes a unique role for the Court, because at one level we adopt the new Constitution in 1996, and it's quite clear that the country, and most of the people in the country, do not live under the conditions promised in the Constitution. And to that extent it's aspirational. And many constitutional around the world are aspirational, and as a result they can become meaningless, because, well, we never get there. And if we never get there then what does it mean? And I think that many famous constitutions, the old Soviet constitution, etc, sat out there as a great aspiration on paper, and in the end people said it's not worth the paper it's written on. And that's very different to a position where you say, well, it's aspirational but people can come in and make these demands and the Court's job is to somehow fit together this aspirational document with the explicit demands that individual cases bring. And I think that that's the realm where pragmatism does matter and it's not unprincipled.

Int In terms of the concerns of the independence of the judiciary in relation to the executive, what are your concerns and fears for the Court and the Constitution?

HK I think they fall into two categories. The one category is, obviously there's always a tension between the parts of a constitutional government. Between the executive, the legislature, the courts. There's a certain healthy tension that has to be...that makes a constitutional system operate. And obviously if one party within that system either becomes too dominant or feels that it has a right to oversee all the others, that is inherent tension. And you can see at times the executive getting frustrated with the fact that it can't just do what it wants or thinks needs to be done. And in that context its frustration is carried out. I think we were very lucky right at the beginning when President (Nelson) Mandela was prepared to stand up publicly and say, the Court has found what I've done to be unconstitutional, and I accept that. I think that was an extraordinary moment. Whether we can expect that moment from every president is questionable, but you hope that we can survive those moments where a executive feels frustrated and wants to strike out against an institution that doesn't give them what they want. On the other hand you also hope that the executive begins to understand that if it doesn't have that cushion of an institution that can say, no, we shouldn't do that right now...the president in many ways at times would like to say, it's not me who's not doing this, it's

because they say I can't...is actually an important part of that constitutionalist relationship, and not to have it, to have every institution that just says yes, actually I think is a problem too for the executive, and that is something which is not necessarily always understood, although it's interesting to watch, at times it has been understood in our short history. It's merely fifteen years, it's pretty young in terms of these relationships over time. In the United States you have the court-packing plan, when the Supreme Court didn't want to do what Roosevelt felt was necessary at the time. These pressures, these engagements, are part of democracy, they're part of a constitutional system. But yes, I feel that there are moments when you can see an unhappiness. Ja, there are moments for instance, the Hungarian court was a very strong court and because of the way that appointments took place on that Court they managed to basically make it ineffective for a decade. Now there's concerns again today that the government is overriding the Court by putting people on it who are not prepared to stand up for the constitution. That is obviously always a concern, and we hope that in our system we will be able to continue to have the kind of quality of judges we have been lucky to have thus far.

Int Speaking of which, given your strong political background, and also people on the Court, for example, Albie Sachs and Arthur (Chaskalson), in 2008 an ANC official actually called the Constitutional Court judges 'counter-revolutionary'.

HK 'Counter-revolutionary', yes, I remember that, yes.

Int What's your perspective on that?

HK But again, that's the kind of reaction that you can expect when people don't get their way. What was interesting was the response by many others who said, excuse us, but this is the constitutional system that the Constituent Assembly, the people of South Africa, created and want, and so, you know, this is very easy to throw these terms around. And in many ways courts are always by definition, they're not revolutionary institutions, they're institutions that slow things down, that manage things slowly. So, you know, as a matter of rhetoric it's all very well, but I mean, you know, on this Court from its founding, not only did you have people like Arthur Chaskalson and Pius Langa, and you had a whole range of people, who had rather impeccable histories in terms of the struggle against apartheid, etc, and whose commitment to both the constitutional system and to the country can hardly be challenged, particularly by young people standing up and making bold statements.

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

HK I think in the beginning the real challenge was how did you actually get to democracy? You had this unique situation where power hadn't been obtained, where it was negotiated, and in that context you have the people who are going to lose power, and let's be honest, once we went to a democracy the white minority that had power would never have it again by definition. At least political power. Obviously they still retained enormous amount of economic power. And in that moment, the question is this, how are they able to give up that power to a democracy and yet feel secure? And that was the secret of the shift from the Interim to the permanent Constitution. The idea that you enabled people to see that the system would be one that protected their interests, at least enough to let go of political power, not to hold on to it. And I think both the two step Constitution making process, but also key, the Court's role in that process, and that's where the founding of the Court became an enormously important part in enabling the democratic transition. The idea that there would be a set of principles, that the Constituent Assembly which as the Constitution maker, really should be bound by nothing, but agreed to be bound by the set of principles that would be...that the Court would be able to look at. And it was fascinating at the moment when the certification judgment happened, when it was quite clear that the legal profession and that others were saying, well, if this Court doesn't stand up to the Constituent Assembly in some way, it proves it's not independent. And yet at the same time, when the documents adopted by eighty percent of the members of the Constituent Assembly, who is a eleven person Court to say this is not the will of the South African people? And so it was an enormously interesting and difficult task that they had, and those judgments are extraordinary judgments to read, because they make very clear their job is not to countermand what the Constituent Assembly has done, their job is to make sure that the Constituent Assembly has met certain conditions. In my own work on it I look at this and say what's really interesting is the conditions they saw most clearly, that the Court saw most clearly, were those conditions that in fact went at the Court's role, went at what would be potentially the Court's power, the question of, whether you could amend the Bill of Rights, and those kinds of issues. The fact that they attempted to make labour law separate from court intervention. And those kind of contexts you see very clearly how the Court steps forward and says, you can't do this. And I think in the end, in fact, it enabled both sides. Made it clear that the Constituent Assembly had the right and the power to write a new Constitution, but at the same time could say, but hang on a second, there's certain shortcuts you can't make, and that for the sake of the legitimacy of the whole you need to step back. And that was seen in how the Constituent Assembly responded. Because they took it in, they turned it around in no time at all, and gave it back, and the Court said, it may not meet every little point that we might have wanted to raise but it clearly is enough for us to recognise that this is the people's will rather than the courts or anybody else's will.

Int What do you think have been the greatest failings of the Court thus far?

HK The greatest failings of the Court...that's a hard one because obviously I'm quite enamoured with the Court. You know, I think that there have been moments in which the Court could have been more...could have explained a little more clearly why it was taking particular positions. Sadly I think the greatest failing has been around the whole conflict with Judge (John) Hlophe. What the decision was or how quick that decision was made to confront him quite the way they did, at one level you could see...you could use that as an example where principle came first, where the claim was, here is an attempt to undermine us, our independence, and so we're going to stand up as one and declare principle, without, I feel, seriously thinking through what would that mean. Because if it was going to be an issue that would eventually come on appeal, this is the Apex Court, it would have to come back to this Court. So in many ways created a situation where there could not be any regular outcome. And I think that that was, as hard as I'm sure it was to make the decisions that were made, that when you look in hindsight at it, was possibly a mistake.

Int The first Bench has been described as the glorious bench, and there are concerns about the subsequent appointments; do you have any concerns?

HK One can always have concerns. One could say Nelson Mandela was our first president and everybody else from that cannot be the same. So I think one has to be a little careful with framing things that way. Our first Parliament had the most extraordinary people in Parliament and will we ever have a Parliament like that again? So, I'm a little bit worried about that kind of characterisation. And of course, the first Bench started evolving fairly quickly as well, so to see the first fifteen years or whatever as the first Bench, I think is also a mistake. I think that, yes, we had extraordinary people on the Court then. I think we still do have extraordinary people on the Court. To be absolutely honest, at the time we had some people on that first Bench who weren't necessarily as extraordinary as others, and today we have people on the Bench as well who may not be as extraordinary as others. But we may not agree always on which ones they are, because some people think they're very good, and we may disagree. So I don't buy the argument that we've had the glorious bench. And also in another sense, we came through an extraordinary transition, with extraordinary people, we're becoming a normal society where not everybody is shining gold? I don't think that that is...I think it's a good thing to become a normal society and to become a society in which we're going to have these differences where not everybody is going to be perfect. But of course within that, the concern is that we still manage to sustain these institutions that we manage to strengthen these institutions over time. I wonder when the first fantastic judges arrived, they'd never been Constitutional Court judges before. They had to make it up as they went along in many ways. And so new people who are joining the Court all the time have to go through that process every time of learning the ropes of becoming justices. Nobody in the context of the US Supreme Court expects the judge when they first arrive to be somebody who's going to, in the end, have the

legacies of a (Justice William) Brennan or whoever, at the end of their time. And so I think it's a little premature for us to look around and go, well, these can never be as great as those that once were, and then feel that somehow the whole institution doesn't have a chance. I think institutionally, institutions have a capacity to build within as well as playing the external role. And this institution will continue to do that. I...of course we all have concerns about particular appointments that we don't think are as great as they could be. We all have concerns that some individuals are not as...argue as clearly in their opinions, or write the kinds of opinions we might like. But that any institution has this variety.

Int In terms of concerns about transition, some say that South Africa's entered a negative phase of transition. As a frequent visitor, do you get the sense that there is now much more sort of negativity around this phase of transition?

HK I think we're in a tough moment at this moment. But the whole world is in a very tough moment right now, and we shouldn't forget that. And so I think what I feel often is because I'm working outside the country, I'm a citizen who's abroad, I have a slightly different perspective and when I come in...and I come back nearly every six months. Most of my research projects remain within the country, whether on the Court or on other legal issues, and so I have a perspective that is both able sometimes to see things and go, oh, gosh, why are we doing it this way? But also to see things and say to friends here, well maybe you shouldn't be as panicked as you are, because this is not that unusual. These kinds of things have happened elsewhere and people have survived them. But it is pretty discouraging at the moment to see the level of internal conflict in many institutions, because I speak to people in various government ministries, that I work in and interested in. I speak to people in the ANC, in the party, and see some of the effects of conflict and disillusion within, and that doesn't feel great obviously. But are we in a negative transition? We are in a continuing transition. I mean, I often look at the whole question of the TRC (Truth and Reconciliation Commission), and I wonder...I don't wonder, I know that this is not over. In the sense that if you look around the world and you see these histories of violence and the way they may get addressed immediately in the immediate transitional period, but how these issues are returned again and again. That trials are held thirty and forty years later in some societies. I don't think these things have moved through our system, and moved through South Africa. I think a lot of these things are very alive, and how we deal with them. Sometimes I think we could all have therapists for everybody in the country and we might do well. But I think that a lot of issues remain unresolved and will continue to come up. So whether the transition, you know, this is a really tough moment right now, but we had a tough moment at Polokwane, and we had a tough moment in the transition, in the initial part of the transition. I'm not sure this one is particularly that different. And how will we manage it? Let's hopefully as well as we managed some of the other tough moments.

Int This should be an easy one...what are the greatest achievements of the Court thus far?

HK What is the greatest achievements of the Court...I think its greatest achievement is the way in which it's built itself...it's a brand new institution that had a whole competing judicial system out there, in many ways. And yes, it was put on top, but it had to build its relationships with that system. I believe it seems to have managed that extraordinarily well. I believe that the Court's image to the world, the way it's carried South Africa to the world, has been a major success. Incidentally, I think that enables it...strengthens it also domestically that the whole world is constantly watching because the way this Court...and it's fascinating to me that of course part of that was accidental. Part of that is the fact that this Court came into being the same time as the web. And so it's one of the first Courts in the world whose opinions appeared available to everybody, particularly in academia, but also now more generally around the world. And so, the engagement with this Court, by people all around the world, was extraordinary, much more than other courts as they start out. And so the success of this Court in gaining a global image, at the same time that had to build its local position, its local relations, I think has been an extraordinary institutional story, which, you know, I don't think is always told that publicly and that openly, because we all focus on the cases and the individual cases, and what's happening. But there's an institutional story here that is extraordinary. And I see the Court continuing to struggle for it. I mean, the lighting of the flame of democracy right here in the precinct. The building of this building, this extraordinary building, this whole Constitutional Hill, these are all about the institutional building of this Court, of our constitutional democracy. And so I think that has been its greatest success rather than pointing to individual cases, etc.

Int Heinz, I'm sure I've neglected to ask you many questions, but I wondered whether there was something that you would like to include in your oral history?

HK Well, what is there to include? You know, I suppose the one thing that I'm really proud of is having served with the ANC underground in that period of my life. It was an honour to serve in the ways that we were able to.

Int Thank you so much, I appreciate it.

HK You're welcome, thank you.

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