

Alan Dodson

LRC Oral History Project

23rd July 2008

- Int This is an interview with Alan Dodson and it's Wednesday the 23rd of July (2008). Alan, thank you, on behalf of SALS foundation thank you very much for agreeing to be part of the LRC Oral History Project.
- AD You're welcome.
- Int I wondered whether you could start the interview by talking about your early childhood memories, growing up in South Africa under apartheid, your experiences, and also where your sense of social justice and injustice developed?
- AD I in fact grew up for the first ten years of my life in Swaziland. But after that lived in South Africa. And went to school in South Africa. I also had a period living in Zambia during my childhood as well. I suppose that my sense of social justice probably comes from growing up in a fairly liberal family. Although I wouldn't, as a child, have perceived of myself as having a sense of social justice. One's sense of...having a sense of social justice I think, certainly in my case, was something that really emerged at university. And it was at university that I became far more aware than in the context of school or my childhood, of the inequalities in South African society. And also of the brutality of the apartheid state.
- Int I wondered whether I could take you a bit back. You mentioned growing up in Swaziland and then Zambia for a little bit, and I was wondering in terms of...contact with black people in school or just generally, was that vastly different from your later experience of growing up in South Africa?
- AD Well obviously my first school I ever went to was a non-racial school, and...on the one hand, on the other hand if I think of how our parents social lives were conducted they were still largely racially exclusive. So in Swaziland a lot of the social activity, when you weren't at school, revolved around the Country Club and that's...whether constitutionally or simply by membership was always racially exclusive. So I think that there must have been a strong influence of apartheid and South Africa on the expatriate community in Swaziland. It was also a colony then. It only gained independence, I think, in 1968, which is in fact while we lived there. I'm not sure if that answers your question?
- Int Absolutely. In terms of going to a non-racial school, as you put it, did you develop firm friendships with black students? I'm wondering, what your social experience was?
- AD Um...ya...in my...I only was going until the third year at my school, until standard one, and in fact in standard one there were only two of us and the other child in the class was a guy called David, who was a black child, or a coloured child I suppose, using the South African kind of terminology. Ya, and we were friends. And...ya, I

suppose I had African friends...my father was a horticulturist and he worked in a research station in Swaziland. And so I would have had a few friends as a child who were African. But...with the wisdom of hindsight, I mean, I think those relations were still affected by race and we had a domestic worker who was an African woman, a Swazi woman, and I think it was her children that I would have played with. Although in fact she was an absolutely wonderful person and I had a very warm relationship with her.

Int So you get to South Africa and then by the age of...?

AD Yes, I in fact, I went to boarding school, I think, in standard two, so I would have been about eight or nine from Swaziland.

Int Ok, right. And then...you mentioned it was really at university that you became politically aware, but prior to that, in terms of...apartheid and just general family discourse or...the newspapers or anything, were there any particular influences for you growing up?

AD Um...yes, in fact as you speak I remember one...my parents had lived in Swaziland until 1970 and we moved to a place called Vereeniging, down the road here, and certainly then actually now that I think about it, I developed a consciousness of the...I started to develop some consciousness of apartheid and the brutality of apartheid. As you talk a few instances started to spring up in my mind. I can remember for example, at the back of our property there used to be quite a wide servitude and people used to play soccer there, and the one evening, I can remember the police vans coming, driving down the servitude, on a pass law raid, and I think all of the people who were playing soccer were people who didn't have passes. And a lot of the people jumped over the fence into our garden and ran up and we had this very big loquat tree and hid inside this loquat tree, and I can remember the police coming to look for them. And ya, my parents allowed them to hide there in the loquat tree and the police never found them. So I suppose that was an early experience of it. And I think our domestic worker, can't remember clearly but there might have been...she came from a place called Clocolan in the Free State, and I think there might have been a kind of a pass law reason that she kind of lived there and came to work and live on our property in Vereeniging. And I suppose there I had a sense of living in a very conservative society, and my parents being politically different to most people who were living in that town, in that area. So ya...

Int In terms of early influences, what were the formative influences that may have led you into the legal profession?

AD Um...most of my pre university life, I didn't really know what to do. And in fact it was more advice from my father, he thought it would be a good idea to do a commercial degree and then a law degree, as a kind of a formal training that could lead me in any direction but would probably earn me a living. It wasn't dictated. There wasn't an early link with a sense of social justice that I did law.

- Int Sure, absolutely. So which university did you go to?
- AD Pietermaritzburg. University of Natal, Pietermaritzburg.
- Int Ok, and...you mentioned that it was there that you really became politically conscious and I wondered whether you could talk about that?
- AD Yes. Well...there were a range of influences I suppose. My first year at university was 1980, which was the year that the war ended in Zimbabwe, and because Pietermaritzburg had a strong agriculture faculty there were a lot of ex-Rhodesian war veterans who came to university that year and a lot of them were really brutalised by the war, and the war had also generated a really bitterly racist society, and there were some really, really vicious people amongst that grouping who came to university. That also coincided with a campaign to get NUSAS off campus, which is the National Union of South African Students, which is a progressive student organisation. There was a campaign to get the campus to disaffiliate from NUSAS in my first year. So from the point of view of those influences there were...it was quite a lot going on and we began to kind of sit up and listen to what was going on. I also remember that that year Zinzi Mandela was invited to come and speak in the Student's Union, and whilst she was speaking and while we were listening to her, there was a raid by the police, who just came and broke up the meeting. So that was the kind of first real experience I had of the brutality of the police. Anyway, there was quite a lot of campaigning around disaffiliation that the right wing on campus were trying to bring about from NUSAS, and they succeeded and the university disaffiliated from NUSAS in 1980. And ya, so those kind of things gradually got me involved in student politics to a limited degree in my first year and then I became more actively involved in student politics, I suppose towards the end of my third year and particularly during my LLB, which was in my fourth and fifth years. And in fact, during, I think the fourth year, I think the first year of my LLB we then had a campaign to re-affiliate to NUSAS, which we won. And ya, that was quite a big thing and I was very actively involved in that. We also had succeeded to quite a conservative Law Students Council and tried to make that more progressive and get them involved in issues of social conscience and get students...get law students in particular more aware of social issues and so on. and I was on the Law Students Council and it was quite an active body politically. And then while we were on the Law Students Council, we organised a NUSAS law conference which we did in collaboration with the law faculty at UCT, and that was very successful. Ya...and then we also had a university...a law school publication, which we also tried to turn from a kind of a just a sort of a student journal into something that was more overtly political.
- Int I'm just wondering in terms of NUSAS and the black students organisation, SASO, where was NUSAS positioned in relation to that, because there had been that break in the 1970s, so I'm wondering when you were at university what the level of interaction was, if any?

AD There was a very...because of the impact of apartheid, there was a very small contingent of black students, and they had a policy of non-involvement in...in student politics. And so in fact there was...what black students tended to do was if there was any political involvement they tend to have it off campus. So in fact there was very little engagement. But I think we persuaded black students, because the affiliation was so close I think we managed to persuade them to participate or a significant number of African students to participate in the vote on the re-affiliation to NUSAS. And I think it in fact made quite a difference in the end because we had a very, very close vote on it. I think that helped to get us re-affiliated.

Int Were you an officer with the NUSAS; what was your role?

AD No, no. I was more just a student member basically.

Int Ok, right. I think you know that the history of the LRC is very linked to NUSAS. A lot of the members, Geoff (Budlender) and others, were very strong NUSAS members...

AD Mmm, mmm. In fact Geoff (Budlender) came and spoke at our...at that conference...at that NUSAS law conference we organised; we got Geoff (Budlender) to come and be one of the speakers, which is probably when I met him.

Int In terms of your knowledge of public interest law, what was that in relation to practical legal activities, was there a Law Clinic at the campus, etc?

AD Yes, yes, and I in fact I was on the committee of the Law Clinic and you could...in my final year they introduced an option where you could have that as one of your elective subjects. And you had to do a small thesis. So what we found was that the Law Clinic was operating at quite a dysfunctional level, so we tried to really jack it up and we got funding from the Ford Foundation, we employed a secretary, we got more outside lawyers involved as supervisors, and ya...I think in many ways we turned it around.

Int Ok. At what point did you...I know you started at the LRC in 2004 to 2006, and that was at this Constitutional Litigation Unit...

AD Yes.

Int ...prior to that... after law school, where did you do articles and what type of lawyering did you do?

AD I did articles at a firm called Mallinicks in Cape Town, which in fact has quite a strong association with Legal Resources Centre, because Lee Bozalek had left a relatively short while before I got there, to go and help set up the Cape Town office.

And...so I did articles at Mallinicks, which was essentially a commercial firm but it had a reputation for also doing human rights work or public interest work. And that was obviously the attraction of the firm for me and that's why when they offered me a position I decided to take it, and I in fact warned them when they interviewed me that I would really like, if at all possible, to do human rights work. And in fact when I started off I did only...I was doing only commercial work and in fact it was...it was in 1985...there was a recession at the time and there was an enormous amount of insolvency work going on, so for the first six months or so of my articles I did...I did mostly commercial insolvency work. But in fact there was one...very soon after I started I had one case which involved an interesting collaboration with the LRC, it was basically within days of starting. A group came to see me about a play by Ngugi wa Thiong'o having been banned, that they wanted to put on. And...anyway, and they needed to urgently appeal against the ban because there was a statutory appeal process. So I was...I mean, I'd been there for literally for a few days and I decided it would be better if I collaborated with somebody on it, so I in fact decided to get hold of Lee Bozalek, and he was already at the LRC at that stage, and we collaborated on the case and in fact managed to get the banning overturned. But it was a fascinating experience. We had to sit in...they had to put on a production of the play for this appeal committee, it was chaired by a guy called Kobie van Rooyen who's still involved in media stuff. And we got the ban not completely and utterly overturned, there were some conditions imposed. I think they could only have one or two performances in the townships or something like that. There were some limitations placed on it, but predominantly we got the ban overturned.

Int Was that because they thought that the play was subversive?

AD Yes, yes, yes, exactly. And in fact, I don't know if it's still there, but certainly for a long time if you went to the LRC in Cape Town there was still a poster from the play up on the wall.

Int Ok, I'll look out for it.

AD So see if you can spot it there. Anyway, then during the course of 1985, there were huge outbreaks of protest all over the Western Cape...

Int States of Emergency or pre State of Emergency?

AD I haven't got a good memory so I can't remember the timing of the States of Emergency. But no, I think the first State of Emergency was declared during the course of 1985. Anyway, but there were protests all over the Western Cape and massive large scale arrests of largely teenagers, who were then charged on public violence charges. And a...a kind of ad hoc grouping of lawyers was formed to try and provide defences for people, and it started with a meeting over a weekend which I attended. And from that moment, I got kind of completely swept into that work. And the firm was quite tolerant about me doing that. I mean, I can remember charging off to go and represent people, without even asking...I was an articled clerk...without asking anybody's permission or anything like that. I mean, I can remember coming

back from my first case, I managed to get some of the children acquitted, and I can remember coming in, sort of reporting to the partner who I thought was the most...

Int Sympathetic.

AD ...sympathetic. And he said: well, that's all very well and great, and he said, did you make any arrangements before you went to ensure that we would be paid anything for the use of your services? And I said: well, no, I didn't really think about that (laughter). And then he said: well, it's fine that you do this work but at least try and see if we can do it on the basis that it's at least to some extent funded. And he had an association with somebody called Moira Henderson at the Dependants' Conference, I think it was called. Used to be based at Cowley House in Cape Town. And after that we managed to get some funding for that work. And ya, I suppose that's really where I got involved on quite an intensive basis in human rights work.

Int What was the impetus do you think, Alan, for the human rights interest in terms of your lawyering? Do you think that it stemmed directly from your student politics or was there some other need in terms of the kind of lawyering you wanted to do...

AD I developed a strong...a strong sense at university particularly while doing my law degree that you could use law and you could use lawyering to make a tremendous difference in society even under those conditions. And certainly already at that stage what we'd heard about the LRC achieving already in its early years was an inspiration for law students.

Int Right. So you're talking about the Rikhoto case, Komani case...?

AD Yes, yes, yes, and that's when one first started hearing about public interest law. And yea, it was an inspiration for people to do that kind of work outside of organisations like the Legal Resources Centre. It also came from particularly studying administrative law because that was the one area of law which created some space to challenge the apartheid state. And we had a lecturer called Lawrence Baxter who wrote the...it's still in many ways, even though it's now outdated, the leading text book on administrative law, and he was very inspirational, and that in many ways was a strong influence on getting involved later on in doing that kind of work. And then also from working in the legal aid clinic, one got a sense that you could help people...you could help people not be complete victims of a legal system and could actually start using the legal system to try to improve their lot.

Int I'm just curious...given the fact that under apartheid Parliament was supreme did you question whether these legal victories, whether it's with the LRC or other legal victories couldn't be overturned by Parliament, because in fact they could have been, particularly during the 1980s?

AD Ya, ya, no, sure, and in fact not even Parliament, and during those successive States of Emergency it was sort of a game of cat and mouse. We would scrutinise each set of Emergency regulations that came through, we'd bring a new legal challenge to try and exploit what we thought was a loophole or a weakness. Because also bear in mind, the other thing that was happening at that time is there were massive scale detentions without trial. So in fact one of the early cases I got involved in was...the Omar case, where we sought to get Dullah Omar and a number of other people released from detention, and that we brought as a Mallinicks case but we in fact used Arthur (Chaskalson) as our counsel for that case. And ya...that certainly did give an impression of the powerfulness of the state because as soon as you found a loophole in one of these regulations and got somebody released, they'd immediately amend...and in their regulations you could obviously just amend administratively. But in the time that you managed to expose that loophole you might have got some people released from detention and then you'd look again at trying to find new loopholes.

Int Sure. So at Mallinicks....you stayed there for articles, did you continue on there or did you...?

AD Yes, yes. I stayed on there. Perhaps I should just mention, the other connection I had with Legal Resources Centre during my articles, and that was as a client rather than as a lawyer...(laughs)

Int Oh really?

AD During 1986 I was called up for a camp...

Int Military service?

AD Military service. And because I'd been at Maritzburg University I was called up to a unit in Pietermaritzburg. And we were sent to Durban and it was a stage when they were using SADF troops in the townships to...to basically deal with protests in the townships. And I couldn't manage to get out of this particular camp. And it was at the time, I think, of the second State of Emergency in 1986. And...anyway we were sent down to Durban and we were told we had to...that we were going to have to patrol townships. And in fact I'd done a previous camp at the end of university which I'd indicated to the military authorities that I wasn't prepared to do township patrols for political...for reasons of conscience. And they'd in fact accommodated me on the previous camp, and I said: you know, can you just make some arrangement again. And they said: no, we insist that you do the township patrols. So I said to them: well, if you force me I'll refuse. And they said: well, we are forcing you. So I said: well I'm refusing. So I was then charged with refusing to obey an order. And anyway, I phoned up Michael Richman who was the partner, who was the kind of sympathetic partner at the firm...well, I don't mean that the other partners weren't sympathetic but...

Int Of course, of course.

AD ...and I said to him: listen, I've gotten into a little bit of trouble, I said, but don't worry I've run a few criminal trials during my articles and I'm sure I'll be able to look after myself. And he said to me: well, you haven't heard of the old adage. And I said: what adage? And he said: well, the one that says that a lawyer who represents himself has a fool for a client. (laughter) So I said: ok (laughs). So he said: listen, I'm going to speak to Chris Nicholson...he was also at LRC in Durban...to see if he can represent you. And anyway, hence my...that was another kind of intersection in my early legal life with Legal Resources Centre. And in fact it was...not only had Chris (Nicholson) represented me but after I'd been charged, they moved me to a military office which was in fact just down the road from the Diakonia Centre, just down the road from the Legal Resources Centre. And because you had a right to legal representation if you were court-martialled, you were allowed to go and consult your legal representative. So I used to buzz backwards and forwards to Legal Resources Centre offices to go and consult with Chris Nicholson. And anyway...so I was then court-martialled and Chris (Nicholson) represented me and I was found guilty, and I was in fact facing a jail sentence, it was quite a scary time. Not jail sentence, a detention barracks sentence, which is basically a military jail. And I was found guilty but Chris (Nicholson) managed to persuade them, I think, by two/one vote not to send me to detention barracks. So...ya, I have that connection with LRC, as a client, and in fact if it hadn't been for that, I think if I had represented myself, I probably would have ended up in detention barracks...

Int What kind of work did you continue doing, Alan, after the articles, which is two years?

AD I went overseas for a year...oh, I worked as an attorney for about nine months at Mallinicks, continued to do mostly human rights work, then I went overseas to do a masters at Cambridge University.

Int Which is my alma mater...

AD Oh, really! Which college were you in?

Int Kings.

AD Oh ok. I was in a lesser-known college called St Edmunds.

Int Oh, right, I know it well.

AD In fact, we just a couple of days ago came back from our 20th reunion. Anyways, so I did that LLM at Cambridge and my subjects there were all designed around coming back and using law as a vehicle for doing human rights work and doing public interest work. And while I was there a more formal decision was taken at Mallinicks set up a more formal public interest law department with Henk Smith, who in fact is now at

Legal Resources Centre in Cape Town, and Mike Evans, and Justin Hardcastle, being sort of main drivers behind that process. And while I was at Cambridge they asked if I'd come back and be the Director of the public interest law department at Mallinicks. So that's what I came back to do. We had a kind of separate part of the building and we had, I think, kind of at its peak, about five full-time lawyers working in the human rights department at Mallinicks. We were funded by the International Defence and Aid Fund, and ya...we carried on for about four years, and I think we were very effective. We did a lot of...we did a range of...we did a lot of work relating to what was happening politically. So a lot of work around detentions, a lot of work around trying to keep public meetings from being banned, challenging bans, rushing off to court on an urgent basis challenging bans. We did a lot of work for victims of police brutality, which was on a massive scale at that stage, there were people getting shot all over the place in the townships. We did a certain amount of political work, so our firm represented Tony Yengeni and a number of the accused in their treason trial. And then we also did, with Henk (Smith) as the main initiator of that, a lot of land related work, so we represented large numbers of communities all around the Western Cape who were threatened with forced removal. And that basically carried on for as long as the International Defence and Aid Fund lasted.

Int Right. Thus through the late 1980s?

AD And early 1990s.

Int Oh, and 1990s as well, right...

AD But with the political developments, International Defence and Aid Fund basically came to an end, and when they came to an end we tried but were unable to find other sources of funding. And you couldn't keep an operation of that scale going without funding. So essentially it all kind of...it all wound down. We spoke to LRC to see if they had space for any of us and they had space for one person and it was decided between us that Henk (Smith) should be the person who should...who would go to Legal Resources Centre. And then we had to try and basically, try ordinary conventional legal work to make a living for the rest of us. So the rest of us reintegrated back into the rest of the firm. For me only for a relatively short while because I was then appointed as a judge in the Land Claims Court in 1995. And that's when I moved to Johannesburg.

Int Ok. And in terms of the Land Claims Court...the LRC brings a lot of cases to the...Court and you were there at the same time as Durkje Gilfillan, I think?

AD She was on the Commission. She was on the Land Claims Commission...

Int So she would have brought cases to you?

AD Yes, yes, correct.

Int I wonder whether you could talk a bit about those types of cases and also the difficulties in terms of land distribution and the law around that.

AD Ya, it was...that's another potentially three hour (laughs) interview, and it's a very...it's a really difficult part of South Africa's transitional process is dealing with the land issues. And those difficulties were reflected in my time at the Land Claims Court. (*Interruption*)...

Int We were talking about the land claims...

AD Yes. it was a...I had a five year appointment to the Land Claims Court, and that was meant to reflect the time that everybody thought that the process would be able to be completed in. Very over-optimistically it turned out. And in many ways the experience there just proved how difficult it is to deal with problems of dispossession of land and property. And it was also a very experimental process in a way and it was something new that was largely, in the form that South Africa tried it, largely untried around the rest of the world. And it proved to be a...a mixed experience in a way. The...the supply of cases that were the massive volume of cases that it was anticipated the court would deal with, never came in many ways. There were attempts to try and look into what the cause of that was. The court was initially blamed as being the reason why the land restitution process was slow and cumbersome. I think wrongly so. And a policy decision was taken to try to, because of the perceived formality and cumbersome nature of the court, to try and settle all land claims out of court. In fact, I don't think that was the right call. I think the people in the court were innovative and flexible enough to deal with the problems. But ya, that was the decision that was made and in fact a relatively low number of claims were...compared to the numbers of claims that there were lodged, were referred through to the court. Of those that did come through it was fascinating work and I think we did a reasonably good job of adjudicating them. But there were far too few and in fact in many ways the court became more the adjudicative body for overseeing eviction, rural evictions, because a whole lot of legislation was passed to try to promote the security of tenure of rural tenants. And in fact that became the predominant part of the work that we did there, which was unfortunate because the main reason for the court establishing had been to deal with land claims. And I suppose it was those frustrations which resulted in my not...like the other judges took extensions of their terms at the end of the five years, but I, for a range of reasons, decided not to. But there were some good parts of the experience and there were some claims that I think we dealt with well. I mean, the one, when you speak about Durkje (Gilfillan), the one that comes to mind is the Kranspoort case...

Int Yes, I wondered whether you could talk about that?

AD ...which was the LRC case and I was the presiding judge in that case.

Int Now did Mr Serumula, did he actually give evidence in front of...?

AD Yes. Serumula, I think his name was.

Int Serumula, exactly.

AD Ya, ya. Absolutely, and...

Int Because I understand he gave a very moving account...

AD Very, very moving account because he was a child at the time with younger siblings. What happened...in fact it's a judgment worth reading just for the sake of the story behind it. He gave this very moving account because what happened is it's quite bizarre. They chucked out the...it was a Mission station, a Dutch Reformed Church Mission station and they basically had a forced removal, and they chucked out the parents, but they had a very successful school there where the headmaster was in fact Mamphela Ramphele's father. And what they did is, the forced removal took place before the end of the school term, so the church said the children must at least stay behind until the end of the school term, then they must go as well. And Serumula, I think was an older child but still at school then, and I think, if I'm remembering correctly, he then had to at the end of the school term, to saddle up the donkey cart and look after his younger siblings and get them onto the donkey cart. And then head off, with these children on this donkey cart to find his parents. Ya, it was extremely moving.

Int I hope to interview him. And get an account from him.

AD Oh really! It's really, it's an absolutely fascinating...the whole case was absolutely fascinating. It's got a really fascinating history and, in fact there's this book that Durkje (Gilfillan) found in the archives of the Dutch Reformed Church that gave the whole history of the place in a lot of detail. Which we then used substantially as evidence for the case. And...ya, it was absolutely fascinating from that point of view. But what we also tried to do in the case was, there were already at that stage reports coming through of problems for communities that returned to their land. And what we tried to do was to, through the imposition of a whole range of conditions, to force the situation where...from the court's side, to force the situation where attention was given to trying to ensure that when people went back they were able to do so on a sustainable and viable basis. And I think the judgment's also worth reading from that point of view, and I think may have influenced some of the steps that are being taken now in trying to address the post settlement situation, as it's described. So, ya, I mean, that Kranspoort I think is an example of some of the positive things that we achieved during that period of the court's existence.

Int In terms of the relationship between the Land Commission and the courts, what was that like? Were there difficulties, challenges?

AD It was a difficult relationship and it started...kind of I've discovered in retrospect...there was a case called the Macleantown case, and at that stage the court had a jurisdiction also over settled cases, so settlement only became final once the court had made it an order of court, basically put its seal of approval on it. And so all settled cases were referred through to us and one of the first ones that came through was the Macleantown case. And what we found was that there were a number of problems with the settlement agreement, in fact it wasn't workable. There was one grouping which had been part of the forced removal, which it seemed may have been ignored in the process. The agreement wasn't drafted in a way that would have properly given effective transfer of land. The form of land holding which was going to result amongst the community members hadn't been thought through and so on, and then there were certain kind of statutory difficulties related to the fact that it was either commonage or municipal land or something like that at that stage. And so what we decided to do was to in fact write a judgment in which we set out all of the problems so that it could be used as a sort of a blueprint for the Commission in future cases where they were preparing settlement agreements and referring them through to the court. And in fact the judgment's reported as the Macleantown judgment. I wasn't one of the judges. But I think it was a sensible way of dealing with the situation and to create some document on the basis of which the Commission would work. But unfortunately it was taken amiss, it was taken as a criticism of the Commission and, I think in many ways influenced the decision to try to stop referring cases to the court. And in fact the statute was amended to remove the obligation to get the court's stamp of approval. And ya, and I've subsequently heard that it was taken amiss by the Commission. So there were problems in the relationship. We did try and...we did try and address them. We had an arrangement whereby when we saw that cases weren't coming through, we distributed the offices between us as judges and we went out to actually go and sit in Commission offices and see if there were ways in which we could speed up the process, and the process of referral and so on. And, in fact, there's a string of cases around a former township outside Pretoria called Highlands, and I think those string of cases in fact came after one of our visits to the Commission office, in which we recommended that where there were areas of uncertainty about the law, you know, bring cases to the court and try and seek declaratory relief...

Int What do you think is the reluctance...?

AD ...there were problems in the relationship and I think that this...I think there are a range of reasons for that. I mean, I think perhaps it is open to question whether the formality of a court was the right structure. So you have the formality and independence and traditions of a court, which immediately, I suppose, makes it a little bit austere. It was based in Johannesburg, the Commission's head office was based in Pretoria. And in fact I've had a subsequent involvement in a restitution process overseas where we had a very different structure with much closer collaboration between the secretariat and the judicial decision making part of the process, which in fact worked a lot more effectively. So...ya...those are just some perspectives on that time.

Int Sure. And having interviewed Durkje (Gilfillan), I...get a very deep sense of the kind of complexities of land and housing work. What made you...what was the impetus

behind you getting involved in the...Land Claims Court? Was it because you'd done a lot of land cases while you were at Mallinicks?

AD Yes, that's exactly what it was, ya. I mean, the Western Cape had a very harsh application of influx control against African people, tied in with the coloured labour preference policy, which meant that you had a lot of African communities scattered around the Western Cape who had a very tenuous existence there, many living in informal settlements, which the authorities didn't recognise as being lawful and so on. And yes, we'd done a lot of that work. And that work had kind of persisted after the...you know, with the political developments at national level, meetings stopped getting banned, there was a dramatic decline in police brutality...but on into the 1990s at local authority level in these remote towns all around the Western Cape and to some extent, South Eastern Cape, as well, there were still attempts to enforce influx control and to try and get these communities evicted on the basis of...trespass laws, squatting laws, on the basis of, you know, common law actions to evict people from land and so on. And that became a very big part of the public interest law department's work. It was that that led to my being nominated for the position.

Int Sure. As you mentioned, for a variety of reasons you actually left...you didn't extend your contract beyond that, so what happened then? Did you go into private practice?

AD So then...yes, well two things kind of simultaneously, I'd been an attorney before and then I decided to come to the Bar, so I went to go and do pupillage. And...around the time that I finished at the Land Claims Court, I was approached to get involved in this other restitution process in Kosovo...

Int Ok, was that with the UN?

AD That was to the UN, yes. So the UN had set up this Commission called the Housing and Property Claims Commission, that had to deal with the residential property claims arising both from the war in 1999 and from the Milosevic apartheid era, between 1989 and 1999 in Kosovo. Claimants who had lost residential property through any of those causes could then bring claims to that Commission. And I did that...in fact, I didn't go straight into pupillage either, I in fact had a six month spell where I worked full-time for the UN in Kosovo after the Land Claims Court, and then after that it became session based so then after that I did pupillage and then I would go to Kosovo for a week every second month. And then that process finished last year, in June last year.

Int Ok. And then at some point you joined the Constitutional Litigation Unit and I wondered how that came about?

AD Yes.

Int It was in 2004?

AD Yes. It was, I think, around the time that Geoff (Budlender) was leaving. And...Henk (Smith) encouraged me to think about going in...taking over from where Geoff (Budlender) had left off.

Int Sure, right. And I suppose that was before Wim (Tregove)...Wim (Tregove) had been there quite early though...

AD No, after Wim (Tregove).

Int It was after Wim Tregove. Right...

AD Yes.

Int And I wondered whether you could talk a bit about that because that was...was that in the Johannesburg Regional Office or...?

AD Yes, yes. It was in the Bram Fischer House.

Int Ok, could you talk a bit about your experiences at the CLU?

AD Yes. Funny enough the...the CLU had been, there was a kind of an interim, I think, where Geoff (Budlender) had been acting as a judge for quite a long period so things were kind of quite quiet when I got there. And a combination of that and my background on the Land Claims Court meant that certainly during the time that I was there, probably the greatest part of my work ended up being, and not unhappily so, ended up being land claims work and other property related work. So we...a big part of our time was spent taking the Mphela case, which was a land claims case, which has now recently been through the Constitutional Court, which is also a case that Durkje (Gilfillan) is now involved in. Taking that through all of its different phases in the Land Claims Court, the Supreme Court of Appeal and ultimately the Constitutional Court. And...ya, that was my focus, whilst I had anticipated doing more...doing less land work and more conventional constitutional work, if I can call it that, the main focus of my work I'd say during that time was still land related work. And I think it's also just an area where LRC was able to tap into my expertise.

Int So did you work with particular people in the CLU, because it's always quite small? Who did you work with while you were there?

AD Um...I tended to do work with...in fact with attorneys from different offices so I've done work with Mahendra (Chetty) at the...

Int ...The Durban office.

AD At the Durban office, and I've done work with...I've done some work with Cape Town...some work with the Pretoria office while it was still open. And I worked with a couple of different attorneys; I worked quite a lot with Louise (du Plessis). I suppose my main focus in terms of a particular case in the two years was the Communal Land Rights Act case.

Int Ok, could you talk a bit about that, Alan, so that people could have an understanding of what the case was about?

AD Sure. The government introduced in parliament the legislation, which is envisaged by the tenure security provisions in Section 25 of the Constitution. That legislation had been a long time coming and its content had changed over time with the different officials within the Department of Land Affairs. And the end product of the legislation reflected some, what we consider to be unfortunate compromises because it was passed just before parliament broke up for what would have been the past elections. And accommodations were reached with the traditional leadership lobby that I think, and you can say had unfortunate consequences for the legislation and in fact resulted in its own unconstitutionality. It's very, very important legislation because it effectively creates the land tenure regime for all of the former homelands and trust areas around the country, and...I can't remember the exact numbers but I think it's something in the region of twenty million people who are potentially affected very directly in their daily lives, in their relationship to the land by that legislation, and we basically say that the government got it wrong in the way that it went about designing it, ultimately in the form that went through. So we've launched a very substantial challenge to that legislation which is set down for hearing in October this year. And the main areas of the challenge are firstly that we say it will in fact undermine security of tenure rather than enhance security of tenure, as the Constitution requires it to do. And the reason we say that is that it completely undermines what we say is the true customary law based regulation of land, which we say is a nested system which operates at many different levels from bottom up, whereas the legislation as they've designed it is a top down model, which really contemplates just ownership either at a community level as represented by an administrative committee or at an individual level, which we say is completely in conflict with true customary law, not customary law as it's been altered through apartheid and colonial legislation. And we say that that's going to undermine people's security of tenure on the land.

Int So that goes before the Constitutional Court?

AD And that will ultimately go before the Constitutional Court. It's got to start in the Transvaal Provincial Division. And then there are a range of other challenges to it, we say that it gives undue and inappropriate powers to traditional authorities to assume leadership positions in respect of the administration of land. We say that it's discriminatory and racially discriminatory in the way that it creates effectively a different form of, and regulation for essentially areas that are occupied by, African

people. We also say that it discriminates on the basis of gender, it discriminates against women. And a couple of other related grounds of challenge.

Int I'm also wondering, you were at the CLU for two years... in that period what were some of the difficulties and challenges for working with the CLU in relation to the LRC as such?

AD I suppose the main difficulty was that it had been...kind of left...been left...dormant, is putting it far too strongly...but I hadn't...because of, I think mainly because of funding problems. When I got there it wasn't nearly as vibrant as it had been when Geoff (Budlender) and Wim (Tregrove) had been there. And there wasn't the same kind of rapid inflow and outflow of cases. And it was a stage, a kind of maturing stage, I suppose, of the Constitution, in fact in the early days there was just this absolute rush of early constitutional litigation. You know, including the death penalty case and the certification cases, and so that kind of initial heady rush of cases had dissipated to some extent. And also because of the fact that Geoff (Budlender) had been acting for a long time, when I got there, there wasn't a sort of a really kind of steady through-flow of cases. And in fact, also I think because of Geoff (Budlender) having been acting for quite a while, in many cases that were underway there was already outside counsel involved. So I suppose the main difficulty was kind of trying to get into the swing of things and get cases going again. And that's not an easy process and it's also not a process that has a quick turnaround time. So in many ways I've ended up in fact doing more constitutional litigation work...

Int Outside...

AD Outside, that was just kind of getting going during the time that I was there. It was also a time when there was a difficulty with finding a successor to Vincent (Saldanha), and I think that had an impact as well. And...ya, I think also, it affected some of the momentum of the unit.

Int ...I'm just wondering...as a young law school graduate, they...usually the idea of the CLU's really appealing, and so there is this...desire to actually join the LRC and be part of the CLU. But in your experience, how much capacity is there really for training of young lawyers or CAs, for example?

AD Well...I think you have a difficulty in that, certainly in the Constitutional Litigation Unit, when I was there it was me and George (Bizos) and Achmed (Mayet). And George (Bizos) was quite busy, so there was some limit on our capacity to be a kind of a training centre, and there was limited funding in terms of being able to have the kind of number of young lawyers working as active support, as was the situation during Wim's (Tregrove) time there. I tried to change that and in fact unfortunately it just had a...a long turnaround time so that Richard Moultrie, for example, was appointed quite close to the time that I ultimately left. But I think that started to assist in terms of bringing in some kind of young blood. And I think if you've got somebody like that, or like Adrian (Friedman) for example, who's there now, who isn't a complete greenhorn, but who's young and energetic, I think that kind of model

can work where they can look after themselves to a substantial extent, but have somebody like George (Bizos) as a reference point, and myself for the time that I was there. So on a small scale I think it can work, if you've got somebody who's got initiative and got a certain degree of experience already. As a major training centre for very new people I just don't think that the CLU is operating at the kind of scale where you can do that on a co-ordinated basis.

Int When you were there, did you get a sense that CAs were given cases that were quite complex, like land cases, without much supervision, or was that not your experience?

AD Um...it's difficult to say, because I was in the CLU rather than in the Regional Office, and the CAs tended to be in the Regional Office. And I in fact, wasn't really involved in the supervision of CAs. So...it's difficult to tell, but certainly my sense at the moment is that there is reasonably good supervision. But it may be that if you speak to people directly their experience there would be a very different account.

Int Ok. It's often been said, funding is a huge issue, but it's often been said that the LRC is unable to attract good quality lawyers, across the racial groups of course, but in particular young black lawyers because there's such a demand in the corporate world, corporate law firms. Was that your sense whilst you were there?

AD Very much so, ya. I think that's right. And...ya, it's difficult to...and the way I was able to afford to go to LRC as it were, was that I had an arrangement in terms of which I could do some private work at the same time. And in a way I think that's the only sustainable model for getting in good professional people, at least to allow them to do some private work at the same time to supplement their income there. And I think, even with that...even with that for instance, it's just at a practical level, my own experience has been the really difficult process of coming away from the Bar for two years and then coming back, it's difficult to extricate yourself from a practice, people are reluctant to abandon a practice that they've built up. It's difficult to rebuild a practice, I mean that's the process I've been going through now, is trying to rebuild a practice, which is not an easy process. So ya, from that point of view it is very difficult to attract people.

Int The reason for you to leave the CLU? Was it a limited contract or...?

AD I did have a limited contract, ya, so we'd agreed on a two year period, with a possibility of a third year. But what I was finding by the end of the two years I was picking up all sorts of problems here, and that I'd sublet my chambers here. The sublessee ended up wanting to move to better chambers. I was having difficulty then finding tenants. It was proving an irritation within the group that there was this high turnover in respect to the chambers that I was subletting and so on. So it became quite difficult to manage. And in fact my experience has been that I can still do good work with the Legal Resources Centre from private practice.

Int How has that panned out from 2006 onwards?

AD Well, I've done a huge amount of LRC work, I think, during that time. Many of the cases, like the CLRA, for example, has continued since I left. And ya, it's very rewarding and I do it at a very, very low rate, as my contribution, and at the same time it's very rewarding work and it means that my practice isn't only dictated by commercial type work.

Int In terms of...rule of law issues and the Constitution, particularly now the Constitutional Court is under somewhat of a crisis, so is the Bar, and there's all this ...political attachment....I'm wondering how you perceive this crisis and what your concerns are...for the Constitution and the Constitutional Court, and the impartiality of judges?

AD I'm really deeply, deeply concerned about what's going on. I think that there is a...at best there is widespread naïveté about what the rule of law demands, but I just can't see that it's a naïveté, I think that there is a deliberate onslaught on the rule of law and on the court system at the moment. And I think that it's...to call a spade a spade, I think that there has been a decision within the ruling party that our future president should be somebody who is facing criminal charges that the ruling party doesn't want to go ahead. And it's creating enormous, enormous problems, which are causing huge damage to the Constitution and to the court system. And the only way in which you can bring about that end is if you attack the rule of law and you attack the courts. And I think people just don't realise, the politicians don't realise the degree of damage that...the degree of damage that they're doing to the court system, to what has been built up over the years...I think that the attacks of the secretary general of the ANC on the Constitutional Court are highly, highly, highly problematic. I think they're designed to put pressure on the Constitutional Court, in the case it's got pending before it. And ya, I'm really very, very concerned. I just hope that through the Judicial Service Commission process that ultimately sanity can prevail. But I think damage has already been done to the judicial system. It's not legitimate criticism as the ruling party is trying to dress it up as. It's really putting pressure on the courts to try and force an outcome that the ruling party wants in a manner that is completely inappropriate.

Int What do you think are mistakes that were made...to create this crisis? Crises don't happen overnight.

AD Um...well...you know, courts...courts speak through their judgments. They're a delicate institution, they don't have power of their own, they're reliant on the other spheres of government to respect their judgments. And in fact to implement their judgments. So it's a delicate balance, it requires good faith on the part of the other spheres of government. Courts don't have aggressive spokespeople who can push out their point of view. And don't have...I mean, they don't even enforce their own judgments and they don't have indirect executive power of their own. And in those circumstances the only way that they function effectively is if they are given the space by the other organs to do what courts do and just to perform their function in protecting the rule of law. And the mistakes that have been made are that people

aren't giving them the space to do that. And in fact, people in other branches of government and in the ruling party are taking advantage of the fact that courts have that delicate position in order to try and force their own particular agenda. Frankly, also a huge part of the crisis is created by an inappropriate appointment as the Judge President of the Cape Provincial Division, and I think that's leading to a whole lot of very unfortunate consequences.

Int When you say inappropriate, what do you mean by that?

AD Well, I just don't think he was the right person for the job. I certainly think he was an appropriate person for a judicial appointment but I don't think he was an appropriate person to be appointed as the Judge President of the Division.

Int Ok. I'm also wondering in a context like this, the LRC has always been, even in a ...during apartheid...in terms of the regime, the enemy, the common enemy, but then in a post apartheid context, it's taken on cases against an ANC government. What do you envisage would the situation be in a future dispensation for a public interest law organisation like the LRC, which is independent and is able to bring cases against government?

AD Well, if...if the Constitutional Court is allowed to survive and be the institution that it has been until now, there's huge scope for a public interest law organisation. It's proved to be a highly successful court, it's proved a willingness to be innovative, it's proved a willingness to be open to listen to cases that are brought by poor and disempowered people, it hasn't developed a jurisdiction which has the effect of excluding people who lack resources. So, it's also, and also very importantly it's made the development of its socio-economic rights jurisprudence a very important part of its work. And it's gone about it in a careful and creative way. And those circumstances make it very fertile for organisations like the Legal Resources Centre to thrive and prosper and do interesting work and achieve real results for disempowered people. Yes, I suppose that at the end of the day that ones sense is that goodness must prevail (laughs) and that the court will survive and will keep up those traditions. So I think there is a future, one just hopes that one can get through the current rocky period.

Int I've asked you a range of questions, and I'm aware of the time frame, so I'm just wondering whether there's something I've neglected to ask you which you feel ought to be included as part of your LRC Oral History interview?

AD Um...not that I can immediately think of.

Int Sure. I'm going to ask... you've had a long association with the LRC and you've also had a strong background and a long-standing background in public interest law, are there any particular memories, whether it's a client...a particular case, or particular individuals, whether it's Arthur (Chaskalson) or Geoff (Budlender) or George (Bizos), a memory, which...stands out for you, that you might treasure?

AD Um...I'm not sure, there's lots...the one I told you about was the case that I worked on with Lee (Bozalek). LRC coming to my assistance when I was a client (laughs). And I should add to that, working in the same office as George (Bizos) was a really wonderful experience. Going off and having lunches together and...ya, I was there during the time that he went to New Zealand for that International Bar Association Conference where he was given an award of some sort. But it was also the time that he met up with the families of the soldiers who he and his father had rescued ...

Int Really...!

AD So he was kind of...he was all abuzz about that and talking a lot about it and so on, and ya, that was an amazing experience. Ya, I suppose those are the ones that stand out. And also, I suppose, working with Arthur (Chaskalson) for the first time and going off to the Supreme Court of Appeal in the Omar case, again when I was still at Mallinicks but he came in as counsel in that case; it was also a wonderful experience.

Int What is Arthur (Chaskalson) like in your experience as a lawyer?

AD Um, I mean, he's a real lawyer's lawyer, as I'm sure other people have probably already said. But he's...he's really got a wonderful humanity about him as well. I mean, those days I was just an articled clerk working in that place, but I really felt like part of the team and felt that he listened to whatever perspectives I'd brought there on the case and so on. So ya, I think he's a great man with wonderful humility.

Int Sure, ok. Well, Alan, thank you very much for your time and for a thoughtful interview.

AD You're most welcome.

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Legal Resources Centre Oral History Project

PUBLISHER:

Publisher:- Historical Papers, William Cullen Library, University of the Witwatersrand

Location:- Johannesburg

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DOCUMENT DETAILS:

Document ID:- AG3298-1-038

Document Title:- Alan Dodson Interview

Author:- Legal Resources Centre South Africa (LRC)

Document Date:- 2008