

**Fink Haysom**

**LRC Oral History Project**

Interview 1: 8<sup>th</sup> February 2008

Interview 2: 4<sup>th</sup> April 2008

Interview 3: 25<sup>th</sup> April 2008

Interview 1:

Int This is an interview with Fink Haysom...Fink, thank you very much for agreeing to be part of the LRC Oral History Project, we really appreciate it. I was wondering whether we could start the interview...if you could talk about your early formative experiences, growing up in South Africa under apartheid...where your sense of social justice came from and the trajectory that led you into the legal profession?

FH I grew up, I went to very privileged white schools, I grew up in a particularly privileged background, I think, um...

Int Did you grow up in Johannesburg?

FH I grew up in Durban. And I went to Michaelhouse, to an elite school, but a school with a very liberal, committed liberal education, perhaps more liberal than any of the other schools, even. State schools, and so on, seldom match the intellectual and liberal environment. And parents who were liberal, perhaps eccentrically liberal, in which we were encouraged to, I think, think and discuss issues of social justice, and my parents were quite outspoken, my sister was a student activist before I got to university. I went to university, I became, relatively early on, a student leader, joined and was part of the Durban University Left, which was considered perhaps the most active and intellectually engaged environment in the country at the time, I think, amongst all. With a couple of very notable and leading intellectuals in Rick Turner who was assassinated at the time, and produced a crop of student leaders both in the Black Student Movement and the so-called white Student Movement, although it was ostensibly non-racial.

Int Was this NUSAS?

FH NUSAS and...that's right, my predecessors, as SRC Presidents, included the crop, well-known national student leaders, Karel Tip, Charles Nupen, Paul Pretorius, Halton Cheadle. And Durban was really the kind of centre of left thinking at the time and it was also the birth, in many senses, of the Trade Union Movement. And I think that very much influenced the thinking amongst student leaders, who, at that stage, were, although it's unfashionable to say it, really thinking and taking new directions in resistance to apartheid, particularly, kind of, making the decision to link with the working class, as it were, as a vehicle of change and resistance, and had become many of the...my associates and colleagues became deeply involved in the nascent Black Trade Union Movement. I went on to do my LLB in Cape Town, and graduated in

1978. By that time I'd been to jail three times and...four times, I think, twice for periods of solitary confinement, detention, and twice for refusing to testify in a SWAPO Comrades trial. I did my Articles in Durban in a...quite an establishment law firm, partly because I couldn't get Articles anywhere else, not least because I was having one year jail sentence hanging over my head waiting to come into play, pending appeal, and only Shepstone & Wylie in Durban would give me Articles, so I did my Articles there, and went to jail again, during those Articles. By that stage I'd been president of two campus student bodies and President of the National Union of South African Students, so I was pretty deeply engaged and seen many of friends arrested and detained, but as I mentioned, one, at that stage, assassinated. And you grew up in that milieu, of course it's a formative milieu, it's your determining culture. It was then a predominantly white milieu, white left milieu, but I think that began to change almost with my presidency at NUSAS, in which NUSAS made an implicit, much closer alignment towards the ANC. So I think in my own career choices, the questions arose, which were directly related to how best to make what skills, as an intellectual, I had available as part of the broader Anti-Apartheid Movement. Not initially persuaded that it was law, and some of my early critical student writings reflect deep pervasive cynicism about law and legal institutions, and arguing that laws reflected the interest of the ruling elite, and so on. But engagement in...particularly through the trade unions, recognising that there was space for engagement in the legal form and through legal techniques, legal forms, and seeing in particular, the kinds of ways in which law could be used to create a protection or an umbrella, under which organisational rights people could come together, form associations, and act collectively as opposed to individually. And really have an impact on political life in the country, political, economic and social life in the country, and I think that cemented my decision to become a lawyer. I was earlier on involved, even working with Shepstone & Wylie, with pro bono work. One particular one which is quite an important one recorded in the Law Reports on...which became an enduring issue throughout the next ten years, which was the right to be heard or *audi alteram partem*, and was used as a basis to set aside virtually everything, from detention orders, to banning orders, declarations of a State of Emergency, promulgation, regulations regarding food, detainee...I opted in 1979, when I'd finished my Articles, to go to CALS, the Centre for Applied Legal Studies in Wits, because if Durban had been the kind of intellectual kind of heartland of the 19...of the mid 1970s, Johannesburg became, in the early 80s, the kind of centre, certainly legal, creative legal firms, initiatives and approaches. Three of us, three academics who were writing really about the way in which law was used by the regime, and creative ways of approaching the law, decided to form a law firm to put...to put theory into practice. I had considered joining the LRC both in Durban, which was, at that stage, just being formed, or in Johannesburg, but really opted to go the private law firm route. Because I...we thought, there was a group of us, who were kind of intellectualising what the law could do, saw a particular need for, in a sense, a complementary Public Interest Law strategy. And that complementary strategy was based around the constraints, which operated I think on the Public Interest Law initiative represented by the LRC. And those constraints were that, I think, hard to remember now, but the enormously repressive environment directed even towards legal and law initiatives, and the insistence that the Public Interest Law initiative should not be a political one in its simple and direct sense. Of course every...all Public Interest Law is political, and whereas the LRC engaged with, as it were, test case litigation around interests which had broader application, particularly to the poor, those of us who were kind of more

organisationally linked and attached wanted to engage, I suppose, in litigation more directly connected with the organisation of People Against Apartheid. So that meant political trials, and if I could say this, that I think what Cheadle Thompson & Haysom did, and became I think, over ten years, the...perhaps the most aggressive of the litigators in this field, was to take from the Civil Law, the remedies and approaches and apply them much more generally. In other words, to use law aggressively as opposed to defensively, to kind of roll back the pessimism, the legal pessimism, which characterised legal endeavours in the 70s and 60s. Quite understandably, and I don't criticise our predecessors, people like Raymond Tucker and Priscilla Jana, who were essentially running defensive operations trying to minimise sentences. Our approach would be to expose new angles of law and attack, and even social organisation, through attacking issues like freedom of movement, freedom of...sorry must have meant freedom of movement, I mean that really was an issue that the LRC made its...made its own...

Int Sure...

FH But issues like publications, the right to organise and hold meetings, creative defences to treason trials, and we ran four of the big treason trials, all of which we won. And it changed the entire legal landscape. Instead of trying to stop people going to jail for long periods, and conduct defences, which would mitigate sentences, we were trying to challenge the very basis of the legal charges, and the way they framed treasonist behaviour. And from there it began to roll, initially, particularly, concentrating on the labour relations field, working very closely with and representing COSATU, the National Union of Mine Workers, the right to organise, the right to protest against unhealthy working conditions, which in itself becomes an organisational tool. The National Union of Mine Workers really got going after a court case we brought to prevent the dismissal of four workers who refused to work in a dangerous mine. And from that Cyril Ramaphosa took that right, and went to mines, and recruited workers on the basis that he would campaign for safer working conditions, and that was his big breakthrough. So we then, you know, would apply that in areas in which the UDF was involved, we would apply it in areas such as detention conditions, challenging States of Emergency. And the most creative case I think I was involved in was one, which sought to apply a patent remedy, which is when you can't get the evidence to have a trial you can search the premises of your rival's company. We took that and said: we can apply this to searching for torture equipment, and it requires a particularly...it was a particularly difficult...it was going to make completely new law in South Africa, we had to persuade that the remedy existed in South African Law, and then that in this case, they would allow us to search a particular Police Station in East London. And we won the battle, the war. We lost the battle because they said our case had been so meticulously prepared, that in fact we didn't need the remedy we would win in any event in a Civil Court, we'd been able to prove torture. But that is an example of how one's trying to constantly be much more creative and aggressive with the law, and more organisationally linked. So I think that's...that takes you...

Int Sure...

FH ...that takes you a good way through the interview.

Interview 2: 4<sup>th</sup> April 2008

Int I'm just wondering whether I can...?

FH Let me just assess the LRC because it means so much. The SRC (means LRC) was a very important part of that legal renaissance. It wasn't the only part of it but it was a very important part. It did a number of things, it brought some really formidable legal intellects together to work collaboratively and, you know, looking and assessing the LRC in its significance was the way in which the...through the kind of test case...approach, you could pick distinctive aspects and start to challenge them, and literally, I must say for...take my case because I did similar kinds of things but in other fields like Forced Removals; we won three Forced Removal cases, they had never won a Forced Removal case in South African legal history, we won every one that we took. Well, the one went all the way up to the Appellate Division before we won it, but the law is bad, and so on. And so people hadn't really thought: how can we challenge this one? And quite frankly, many of our challenges were hardly based on a kind of justice-based approach, although underlying it there would be justice issues, unfairness, but they were based on really quite technical, technical...had there been consultation? The Act requires this kind of process or procedure. So very often it was procedural. But the approach was to really take on the...and at a very time...at the very time in which the South African government was facing increasing international scrutiny on its use of the law, and finding it more and more difficult to simply replace a stratagem which had been defeated in the courts, with a new law which would override the courts. And one can think there of the Banning Orders which were set aside, they didn't just replicate it and make explicit so that a Banning Order could be issued without notice and without hearing the parties, they just abandoned Banning Orders. So that's a critical part of the strategy and it makes that legal strategy possible, the fact that there was international scrutiny. Another thing, which makes it possible is that, the judges were more receptive to human rights-based arguments or to human rights considerations, which I don't think they would have been or as receptive, some years earlier. There have been a number of studies, John Dugard's; Hugh Corder's studies, which have shown that the courts are not even in their consideration...What we were doing at Cheadle Thompson & Haysom, or in particular Cheadle Thompson & Haysom and Paul Benjamin and one or two others is, we were writing in the Law Journals at the same time, so we were in a capacity to suggest the proper application in international standards and adjudication of certain issues, whether it be labour relations issues, whether it be police right to use lethal force, or whatever, and then able to argue those cases in the courts, and in a sense both condition the legal jurisprudence and then engage on the issues before the courts. And I think if you don't do the one, it's that much more difficult to do the other.

Int Right...I want to ask you more about the relationship with the LRC, but I think what I'd like to do in this interview is really to take you right back from where we started at the beginning...You mentioned that you went to Michaelhouse, that you had a privileged upbringing, that you had parents who were eccentrically liberal. I wondered whether you could really elucidate a bit more about that, in terms of where

your sense of social justice came from, did it come really at the tertiary level or did it come before that?

FH Ja, I went to the navy, I graduated in a very elite tough course, one of a kind of...and as I graduated top I was allowed to choose where I was posted...that was in the navy, so I was a navy diver, a water diver. To my astonishment I found I'd been black-listed and I didn't really...well, I thought maybe my parents or my sister had been involved in an anti-apartheid movement and...but it turns out it was an article I wrote at school which had been published...taken out by a university magazine and distributed nationally. So I think by the time I left school I already had a kind of sense of disgust about apartheid, maybe rare amongst South African whites, because there's a capacity to insulate yourself from the social conditions around you if you're a beneficiary, that's a kind of world-wide experience. But I think in South Africa it was not unusual for whites to be critic...to be critical of the regime, particularly amongst English-speaking South Africans who could in a sense scapegoat Afrikaners as the cause of injustice. But in truth I don't know how you could go through South Africa and not be hit in the middle of the forehead by the patent injustice, if you engaged with your domestic servants, the apparent...I mean, the inequality between the treatment accorded to whites and blacks, servants and masters, and...um...it deeply offended me, and...but it deeply offended most of the people around me and all my siblings grew up with an equal sense of injustice around us. Maybe in another country I would have, you know, played rugby, which was my other passion, and partied, but in South Africa you were...with not a lot of effort and a minimum capacity to, kind of, open your eyes, drawn into this sort of national drama being played out, and required to take sides, if you wanted to be even partly honest to yourself. And once you had taken sides, very hard to cross back...and then, you know, later on, when you work in a non-racial environment where...it becomes even more difficult to even see colour as a...as a...to see colour in the people around you. But that much more exposed to the injustice of what was taking place.

Int In terms of really looking at the fact that you went to...you mentioned that Durban actually provided a very intellectual environment in terms of the university, I'm wondering was that because of the actual...the huge student movement that was going on in terms of NUSAS and the Black Students Movement as well, so in terms of Black Consciousness...this was a period around where Steve Biko was deciding to split...?

FH Ja. Well, I think, I mean, by the time I got to university there'd been a kind of split in the Black Consciousness, a lot of people maintained good relations with Steve Biko, and so on, but the centre of that...you know, the kind of centre of the momentum of the Black Consciousness Movement was really based in the Eastern Cape. Particularly around...I went to see Steve Biko at the time...

Int You did...

FH ...And discussed a whole lot of ideas around kind of where student initiatives should lie, and so on. But there was another movement also developing in Durban, which

was actually saying: actually, our way out, is in a non-racial movement in alliance with the working class, and that was based in the kind of new set of SASO thinking. You know it was more or less as I was president, so there was a kind of transformation towards a kind of more UDF populace...popular and broad-based assault on the regime, or resistance. Why Durban happened to be quite such a significant place probably has relationship to two things, there was an accidental confluence with a number of important intellectuals on the Durban campus at the time, who were talking to both sides, Rick Turner for example was...and of course to the National Trade Union Movement, which had really started and starts in Durban with TUAC and then becomes FOSATU and then COSATU. The second aspect being, of course, the Trade Union Movement there.

Int Now, I'm trying to position this, in terms of when you started university, was this after the Wages Commission had been set up, and Karel Tip...?

FH It had just been...just been set up, ja, ja.

Int So Karel Tip was the...?

FH ...And the, you know, the first wave of white student leaders had been banned and then a second wave, white and black student leaders got banned, and then the third wave of trade union...white trade union leaders were banned.

Int And people such as Charles Nupen, Karel Tip were really around at the same time or were they already in...

FH ...Just ahead of me, but about the same time, you could say in that same time, ja, Charlie (Charles Nupen) and I were good friends, I was best man at his wedding, and all of that sort of stuff, ja.

Int Right. So in terms of the trial that took place in the mid 70s, how privy were you to the details of what was going on?

FH Well I was very close friends with them all, and they were part of my generation, I was also NUSAS President at the time in which that trial took place. Ja.

Int At that time, Arthur (Chaskalson) was...defended Karel (Tip) and Charles (Nupen) and I'm just wondering...?

FH And Geoff (Budlender) was the attorney.

Int Sure.

FH And George (Bizos) was the Junior Counsel, ja.

Int Did you at that time really get to know Arthur (Chaskalson) or was it at a later point?

FH You know I got to know him then, just because I was a very close friend...part of the kind of milieu, and a lot of the evidence started, you know, with NUSAS; it was essentially a trial about NUSAS.

Int Sure.

FH But you know, and I went to Johannesburg, joined CALS and (**inaudible**) you know, you talk about the relationship with the LRC, CALS, Cheadle Thompson & Haysom, we were at parties every weekend together, we were all in the same...playing rugby together actually, sport together, playing football together. We were...it was almost like one club, and following the trials, and arguing new legal strategies, and working together on cases. I got to know Arthur (Chaskalson) much better later on when we were both in the ANC Constitutional Commission together, and did the first drafting of the ANC-proposed Constitution.

Int ...When you went to university did you have a clear idea that law was what you wanted to do because you did mention that you had some problems...?

FH No, I didn't. No, I didn't. I thought about it, then I discounted it and I thought I wanted to do sort of politics proper. Then like a lot of people who think about doing politics proper, said: what am I going to do with politics proper? And philosophy doesn't change the world, real skills do, and if you want to kind of assist, you've got to bring something to the table. And so that sort of dragged me back into law.

Int Right. And you went to Cape Town at that point to do your LLB?

FH Ja.

Int What was the climate like in Cape Town, did you become involved in student politics there as well?

FH Yes. I'd been pretty...I'd been a student leader at Durban, went to Cape Town and eventually became engaged there and eventually became President of the SRC. NUSAS was in a quite a parlous state then, it had been really affected by the right wing drift on the campuses, in turn partly caused by what was happening in, then, Rhodesia. So I got involved in NUSAS as part of a strategy to revive it.

Int Right. At which point did you...?

- FH ...We had gone through a stage of thinking of ditching it as well.
- Int Really? NUSAS?
- FH Ja.
- Int Interesting!
- FH Just letting it implode. And I think we thought: no, it was actually better to kind of work more broadly and engage students in an organised way. I think that's true today, by the way, they don't have an engaged student movement in South Africa.
- Int Sure.
- FH Because of the decision to collapse student organisations, National Student (**inaudible**) Organisations...
- Int When did you come to the attention of the Security Police, because you've mentioned that during the 1970s you had been detained several times and you were in solitary confinement, so I'm wondering when that started...?
- FH Well, I think...you know, in those days the Security Police had a really quite disproportionate and unbalanced interest in white student politics, so I think the moment you enter the terrain you're going to be under some degree of surveillance and monitoring. But my first real engagement...and what transpired later is that they had engaged a fellow student leader to spy on me, that all came out later, but it...I hadn't been particularly worried about it at the time, in fact, I'd been a little bit sceptical of people saying...people who had said, you know, you're under surveillance. Because I thought that was a way of...of making people feel more important than they were, when everybody felt their 'phones were tapped, and so on, and I was a little bit dismissive of that. But in Cape Town, ja, we became engaged, you know, in Cape Town now it was 1976, so 1976 Soweto erupted, and I was first picked up for leading a march on solidarity, a march into the townships, and identified as a ring leader and taken off in what was then Section 22, of the General Law Amendment Act.
- Int And this was your first experience of detention?
- FH Ja. Ja. Ja. Then I had, I suppose, what was quite a period of reflection about what I was going to do. Certainly the six months I spent in solitary confinement in 1981 when there was this sort of nation-wide crack down, they took leaders from...
- Int ...



FH ...Trade Unions, community organisations, that was really at the time that Neil Aggett committed suicide and died here.

Int ...by this time you'd gone to Johannesburg?

FH At that stage I'd done my Articles, I was working at CALS, I was working very closely with the kind of what I suppose we now call the Mass Democratic Movement working with trade union leaders (**inaudible**) sort of, embryonic UDF organisation, affiliate organisations. When I got out I was banned as well so that...for two years, so...banned is...ja, it's a lot...it's not nearly as unpleasant as being detained, but it is quite incapacitating politically, you're not allowed to be politically engaged, you can't have more than one person in your company, in my case I wasn't allowed onto universities, factories and law courts, so it was a pretty comprehensive constraint on the things that I was doing. I got engaged then in doing a study of torture and (**inaudible**) emerging of torture techniques used in political trials, and before it became very widespread. This is why at Cheadle Thompson, we did so many of those cases, we did the Wendy Orr case which exposed that pattern of assaults, and I think, you know, a lot of those cases become so damning because we got an inside source, and without them you're always really...it's always really difficult.

Int But your experiences of detention...there were three periods during the 1970s?

FH There was, I'll tell you what, there was 1978, sorry...?

Int '76?

FH 1976...in 1978 I was then charged with...subpoenaed to give evidence, which I refused, and I was sentenced to a couple of days in jail. When I got out I was re-subpoenaed and then sentenced to a year in jail. I began to serve that and then I was...the trial collapsed, and they let me out on bail. And then in 1978, '79...or was it 1980? I was in Durban working as an Article Clerk, then I was detained again. Then in 1981 I was detained for a long period, and then banned.

Int You mentioned you had a period of reflection when you were detained?

FH Well, in jail, I mean, I think when you...when you're there one thinks: how do...what is the most constructive thing I can do? And I think before that, I was kind of engaged half-half, you know? Half in a much more organisationally engaged way, and half in the law. And I think I came out of that thinking actually the best thing you can do is to provide proper and adequate legal support. I didn't believe that just being a good lawyer was the best you could do...individual efforts without set...without analysing what it is that is going to change South Africa. What is wrong with South Africa? What are the forces, which could change it, and so on? And realised that engaged social organisation was a way out.

Int I'm wondering why you chose CALS when you had considered working for the LRC both in Durban and Johannesburg? What do you think was really the motivating factor?

FH I think two things really, I think CALS offered me the possibility of both being engaged intellectually, which is kind of particularly writing and reading as well as practice, and I think that that duality I've maintained ever since, which is that I've really done so even the work I do now. You have to have space to think as well as to act. And I think they become mutually reinforcing, they feed and enthuse each other and inform each other. So that would be one...one way...one...and I think secondly I think those of us who were more politically aligned or wants to be more politically engaged. I think, you know, the question, you can defend the worker by establishing a precedent is important, but you can strengthen and build a trade union but you can only do that if you work for that trade union so that the trade union wins the battle, and that's...was in a sense I suppose the dichotomy between two approaches, which led to some exchanges between the LRC approach and our approach. Personally looking back on it, I mean I think they're, sort of, all part of the concrete whole. But the LRC approach needed another side to...there was another side which was left open and ditto from our side. The other thing is, we were able to use in our sort of more aggressive political engagements of the courts, the stuff that the LRC was...battles that...you know, the battles that they were winning on their court cases and quite frankly probably vice versa.

Int Right. In terms of how the LRC was perceived at that time: When you joined CALS, what's your sense of the perception, was it considered more conservative in the political spectrum and the legal spectrum? What was your sense of the LRC at that point?

FH Ja, I think the answer is yes. Um...do I think so now? Probably, but I think there are different strategies, you know, I mean, I think, as I said to you, there's a complementarity.

Int Sure.

FH They were doing things much more thoroughly and much more engaged and throwing real effort into cases, and when I say they weren't working organisationally that's a bit unfair. Geoff Budlender did a lot of work amongst rural communities, which you know, they may have been legal points, but they were about communities coming together to resist forced removals. And no different to what I was doing, quite frankly. So, in some senses we were competing in the same field, in some senses we also used to split work and say: hey, will you do this case? And they would say: look, we've got this guy, we can't do a political defence on a treason trial, or whatever, therefore can...can you do it? And that's why, in a sense, you see Arthur (Chaskalson) doesn't appear in political trials proper from then on, although George (Bizos) did, but he hadn't joined the LRC.

- Int Sure.
- FH It's also, you know, the LRC, and a bit like Cheadle Thompson & Haysom, become real zones of non-racial common endeavour which had...I think...I think was important part of the culture of that period.
- Int You've alluded to this...if under apartheid Parliament was supreme, how do you think...did you feel that actually engaging in a legal way maybe had the impetus to change things?
- FH Well, it did.
- Int Yes, it did, I understand that but...
- FH It did. So the question is, did I think it could?
- Int Yes...
- FH I thought it could and it did have. The question is, why did it have? Because it need not have.
- Int Exactly...
- FH Um...and when in the course of my other work, I'm involved in other situations, you can have a slide into barbarism, or a kind of...an absolute contentless legal form, and the state always has that option, it says: I'll tell you what, we'll put into laws all the most draconian stuff and we'll cut out the courts and we will give policemen the right to kill on sight in the law. And they do do that. South Africa didn't, it didn't...and there are three reasons. One is that the legal form, for some reason, has a real traction in South Africa, and the courts, and fairness in the courts, it has to do with colonial culture, it has to do with the oppressed experience of the courts as a real forum in which they have a voice, and sometimes equality. Because what courts do, is they make litigants equal in a kind of a way, you can't do it any other way, that is the legal form, if you don't want to go through the legal form then you must find other ways of dealing with it, keep them out the courts. The third thing was that, clearly by the mid eighties, the South African government was unable to move to a kind of barbarism because of the international scrutiny that was on it. It had to maintain the veneer of a kind of civilised legal form, and it was unable to respond to this avalanche of legal challenges setting aside and circumscribing its action. So it had to learn to live with it and try and manage politically. Which produces the one aberrant side of the South Africa state of the late eighties, which is the dis...which is to maintain the legal form, to lose those cases, but to establish a dirty tricks brigade, which work outside the law. And that strategy is manifest in the rise of vigilantism, and Third Force, dirty tricks, Vlakplaas, who then work, not sanctioned by the law, but unsanctioned by the law to avoid this whole battle taking place in the courts, secret assassinations, and so on.

- Int I'm curious in expanding that point, I'm curious why the legal victories that were so fundamental in terms of Pass Law cases that the LRC won, why you think the State didn't actually pursue that much more aggressively and overturn it in Parliament, and whether, as some people have told me in interviews, whether there was, within the Afrikaner establishment, a sort of reverence for the law?...
- FH No, I think there was a reverence for the law, but I don't think that's enough. You can use the law also to find other ways around it, in a sense, apartheid is an attempt to dress up in legal form, discrimination as a form of equal treatment. No, I think it really has...you know, by the end of the seventies they'd...or sixties, they'd exhausted their kind of legal arsenal. And then in the seventies, with these cases, or the eighties, we rolled them back and they had hard choices, which is to try and really find something even more abhorrent legal form, at a time in which they were trying to persuade the world that they had an answer. And they couldn't do that. And I think it happens at the same time as the South African economy becomes more and more vulnerable to sanctions, boycotts, just, you know, holding friends and holding the line, you know, um...They were fighting an international diplomatic battle for their own legitimacy. There are some who would argue that the legitimacy is a two-way...so it's not only outwards to the world it's also inside, depending where you want to put your emphasis, the kind of self-interest side which is, we're trying to defend the attack on our legitimacy from outside therefore we can't provide new, more harsh draconian provisions, or we have our own internal legitimacy to deal with, that our own priests are beginning to question apartheid, or our own journalists, and so on.
- Int Fink, I would like to go on but I'm very aware that you have to go...so I'm wondering whether we should stop at this point...?
- FH You've got five...you can probably do six more minutes...
- Int Six more minutes? Ok. What I'm trying to also understand is that the Rikhoto, Komani cases, those were fundamental victories and I'm wondering, at that point you were with CALS?
- FH Mm.
- Int How you perceive those victories in relation to how things could be changed and do you think at that...that in some ways, kind of encouraged you in terms of the type of work you undertook later...?
- FH Ja, I think so. I mean, I think both...there were two things about it which I think more or less strengthened the...Halton (Cheadle), and my perspective. The one is that the courts could be used, it was a demonstration that you could take on, what was seen as really unchallengeable things, if you were creative and energetic enough and thorough enough. We were working as attorneys as well, and attorneys have a very sort of low esteem, you know, you're not advocates, and we had worked a whole new way of

practising as attorneys, we were thinking up the law and creating new strategies. But the second thing it did is, it said that Komani has limited impact to change apartheid, unless it's also linked to building a political and mass-based organisation, which could confront the authorities. So you could roll back some of the front lines of apartheid control, social control, by allowing people, say, freedom of movement, but you're not building an organisation unless that victory is linked to people coming together to form stronger and bolder forms of social organisation capable of it. So in a sense, ja, we both sort of...we were engaged at the time...there were other things at the time going on and there were a whole lot of initiatives. Lawyers for Human Rights were running the Johannesburg wide campaign to stop the prosecutions on Group Areas. And there, we just went in and every Group Areas violation we put the guys through the loop.

Int Was this pre UDF?

FH It was John Dugard's idea actually...

Int Was it pre...?

FH ...It was...is to go...the Group Areas Act prosecutions are actually quite difficult, because you've got to prove that the area belongs in the wrong area, and the guys can't come to court and say: this is in a white area. Prove it's a white area. So the guys were having to find the original surveyors' charts, and so on, and it more or less stopped the Group Areas prosecutions. Now that was a much more organisational...it wasn't a fine legal point...but the whole, sort of, let's say the legal coalface, became an area of...Black Sash were doing interesting things as well, and they were also piggy-backing off the Komani and the Rikhoto...

Int cases...

FH ...Rulings. Ja. You know...it kind of sets...And what CALS was doing every year was organising...picking up the best judges from every division, bringing them together, and then kind of teaching them Human Rights Law, teaching them what was happening in the rest of the world, taking the most progressive judgments in Britain and America, and so on. And, you know, playing part of that jurisprudential world, acclimatising judges to a new set of aspirations, you're not really a judge unless you understand and enforce human rights, you know? And...and it was interesting for me because, I mean, for me, I was one of the sceptics who said the law is a dead-end, the whites...it's parliamentary supremacy, the judges come from the same class, you know, it's a kind of determinist argument, but if you go down there, it's actually paralysing. Because there's nothing you can do, except possibly take up arms.

Int But you proved that one...

FH I must tell you, taking up arms requires lawyers.

Int Right...

FH No, we were engaged, we did...we did the toughest defences, the Mkhonto cadres. And those too, they've become...courts become areas of engagement, intellectual engagement on the basis of apartheid, it...they became areas of exposure of police methods. We did a...you know, we did a lot of Commissions of Enquiry and inquests, which are wonderful forums to engage in as a lawyer; the state is not prepared, they don't have a case and you can run them just to unravel exactly what is going on within the state machinery, and who's doing what to whom. And those were...those were...that's another way in which the law, you know, turns out to be a major instrument; that's a transparency mechanism on issues which you would otherwise never be able get new information. Suddenly it goes into a legal form, all your quest...can we do this, can we do that, suddenly you're in a Commission of Enquiries, we want the following documents by tomorrow, and they've got to be produced, otherwise they must abolish the inquest as a remedy.

Int I'm wondering whether we should stop at this point...

FH Let me just...let me just make this. I...this is something I learnt in my later life, retreaded as a constitutional peace-maker, is that was South Africa, and I learnt an enormous amount from it, but to go to Burundi and try to argue that people could put their faith in a social compact, underwritten by fundamental rights in the courts of law, they just laughed at me, and they were right. There is no...the legal institutions did not exist in Burundi to stop a genocide, or to prevent a mass of widespread abuses. And...which makes one go back to South Africa, but it also makes you think about...realise that if Burundi is going to get out of its current predicament for Burundi we'd...you know, a number of countries, there has to be also the construction of the institutions...

Int Sure....

FH ..., which are capable of enforcing, rules...which would take us through to the final questions that you wanted to ask me.

Int I'm wondering whether we should stop at this point and continue because you've certainly given me food for thought in terms of questions that I'd like to ask you...

FH Ok.

Interview 3: 25<sup>th</sup> April 2008

Int Fink, thanks very much for this...well, technically our third interview, really. I'm just wondering, the point at which we left off was speaking about the relationship between CALS and LRC, and also I wondered whether you could talk a bit more about where the Black Lawyers Association fitted into this, as well?

FH Ok. Well firstly, I think I...you know, I think one can look at aspects of really quite a competitive relationship between CALS and LRC, and read more into it than it was. Which was just really keen, enthusiastic, really talented lawyers on both sides of the line, really wanting to open up the legal frontiers and have good healthy...(inaudible) was an...firstly, an enormous amount of collaboration, both intellectual collaboration, and also direct collaboration. They signed our affidavits, we signed their affidavits, we drove them around the place, we looked for cases that they wanted to take up, and they helped us with our cases. Many of their lawyers would step out of the LRC hat and become private lawyers for Cheadle Thompson & Haysom, as you know were closely associated with CALS. And so we really had, sort of, three institutions which were exploring and expanding the boundaries of what was possible...what it was possible to do through the legal form. And secondly, there was, you know, within that competition, there was a really natural divide, where the LRC largely responded to what, crudely and some pejoratively, were seen as Public Interest claims, and Cheadle Thompson & Haysom specifically, as legal...as opposed to the CALS more intellectual engagement, were engaged in more political cases. And in a sense, that is...was the right complementarity, the LRC had made and was necessarily required to at least take the form of lawyers for the indigent, which is not to suggest that their cases were not very specifically chosen to have the maximum political impact and the most...the widest impact on society. But we could, for example, step right into the far more contentious and sometimes even more glamorous political cases, trials, inquests, and at one stage really, I think, Cheadle Thompson & Haysom was involved in almost every major case in four centres simultaneously, from, you know, massacres to Inkatha, to so on. Where there can sometimes be some kind of conflict, is often in the funding race, and I think between Cheadle Thompson & Haysom and the LRC there wasn't really a conflict because it's really different...it's different pools. Between CALS and LRC there was obviously some competition, but I think there was more than adequate funds for it, you know, and you need to also look at the boards, you know? John Dugard was on the LRC Board (this is incorrect), Arthur (Chaskalson), George (Bizos) and others were around the...and helping directing legal policy for...for...We played football together, we played probably poker in the evenings, and went to the parties, and there was just enormous amount of social interaction and friendship, between the players. You know, also you were in a relatively embattled community, and politically, we were all largely in the same camp.

Int You were also...you were also a NUSAS person and so were people like Karel Tip and Charles Nupen...

FH That's right, we all came from the same background and, in fact, frequently from the same universities, we'd all been NUSAS Presidents, Geoff (Budlender) had been, Charles (Nupen) had been, Karel (Tip) had been, I had been, Halton (Cheadle) had

been a NUS...a serious Student Leader. Norman Munro had been an SRC President, and Peter Harris and...in fact, many of our black lawyers had also been SRC Presidents so there was a sort of...Really the bar was high, you had to be a serious student leader, you had to be something of an athlete, you had to be able to party through the night, and you had to be able to produce top notch legal work, so...

Int Right. (*Laughs*).

FH It created quite a...a very exciting environment. And I...I...you know, I don't think, you know...there would have been odd, you know, incidents between, but quite frankly, probably less than within CALS or within the LRC, I mean, there would have been a lot more attention there over those years, than actually between us, so I wouldn't exaggerate it. And I think it was a nice complementarity. I'm not sure all other countries require that divergence, but I suspect that they do, you know, I mean, I think, in highly repressive environments you really require the protection, not of an explicitly politically-charged legal movement, but of a movement responding to social injustice for which you have a broader, both domestic and international, protection. What are the other issues?

Int Well, I was also asking about...?

FH Ahh Black Lawyers...Black Lawyers Association?

Int Mmmm.

FH In some senses I think there was also some collegiality to Black Lawyers Association. John Dugard, for example, was very instrumental in trying to raise the funds and getting the initial support to both fund their programmes, and to assist them. To some extent there'd been some political, let's not say...it's not often surfaced, but let's confront it, there was a sort of political divergence, many of the people in the Black Lawyers Association were more closely associated with the Black Consciousness Movement and the PAC. And many of those who worked in the, sort of, CALS/LRC environment were not necessarily more in the ANC camp, but I think overall they were more associated with, for example, NADEL, the National Association of Democratic Lawyers, which was then a more politically, rather than a rationally-defined group. Other than that I don't know, I mean, I think the Black Lawyers Association...well, mind you, it never really rose to the promise, which it should have exhibited.

Int What do you think are the reasons for that?

FH Quality, the persons involved...I don't know, I don't have a particular analysis. They were never successful in litigation, they were never as engaged, I think, as broadly engaged...



- Int My sense is that they...
- FH ...They were probably not as, also to be fair to them, they were not of the same size, you know...
- Int My sense is that they didn't work very closely with the LRC, do you know what the reasons for that were?
- FH No, I mean, I think, certainly I must say for Cheadle Thompson & Haysom, CALS and the LRC we...it was really an attempt to create a non-racial environment. Cheadle Thompson had many more women partners and more black partners than any other law firm, but it was a very mixed environment. But that was very often...being mixed is also often seen as white, a shattering of many of my black colleagues but um, whereas the Black Lawyers Association was by definition. I don't...and I think, quite frankly, because it was...it...although it was the Black Lawyers Association it was not in the political mainstream. The political mainstream was closer to where we were working than where they were working, and I think that's because the country was overwhelmingly engaged in a non-racial, ANC-aligned struggle than a...than a Black Consciousness one.
- Int Right. And I'm wondering, during our second discussion which really wasn't tape recorded, I was wondering, we spoke a bit and you had reflections on your time at Cheadle Thompson & Haysom, about working on particularly horrific cases during the 1980s. I wondered whether you could talk a bit more about that?
- FH I can't remember what I said, but I...you know, if I look at the...the cases that we were engaged with in the litigation side, let me just...before I go there...just say I had this weird privilege of being both a litigator and an academic...
- Int Absolutely!
- FH ...And we were...were writing magazines, cutting edge, jurisprudence stuff, on stuff we were litigating on, and were able to use in our litigation and we did that, both in the labour field and in the...and in the human rights field. And it's a wonderful way of practising law, because you have the space both to find both jurisprudential and other foundations, for claims which you can then advance in legal cases, and in a sense by writing, also engage with the mainstream legal establishment on core concepts. Having said that, er...the...the litigation period was, you know, was a hugely exciting period to be a lawyer, it was challenging, dangerous, I had more than one black partner who resigned, because she said it was too dangerous to be a black practising the kind of law we were practising.
- Int Gosh!

FH You had to go into townships at the dead of night, you had to go into the...you had to go into the police confrontations, you had to stand in the middle, you had to...you had to go to mortuaries, you had to fish people out of hospital, you had to look for dead bodies, you had to...none of the things for which law school prepared you, as a lawyer. Conduct cases in underground conditions, for example, the Wendy Orr case which had to be brought in secret, or the case that I brought in Grahamstown, to search a police station for torture equipment, and...Um, but it was at the same time...Firstly we were tremendously successful which really defined us, separated us from previous generations of political lawyers, who had spent a large amount of time in defence...defence counsel work, in cases which were really...in which the law really allowed very little scope for the defendants, and the treason trial people got off. But mostly it was blunt, criminal cases. We were exploring the boundaries of Commissions of Enquiry to open up the dark and hidden side of government, we were using labour and other cases to expand the parameters of popular organisation, we were attacking freedom of expression issues in order to allow propaganda...and, I mean, it allowed propaganda to be met, and to be counted, and to put out other versions. We were engaging...some of our sharpest cases were about the right to meet, and gather, and hold demonstrations. So it's about creating a space for an engine, which is not the lawyers, it's the people themselves, but the lawyers have a very important role in providing the political space to organise. And I think at the end that is the most important role that we played. Work was rough, and often, you know, I think I mentioned to you, a lot of the dilemmas we faced with your own clients bringing...bringing in people they've tortured, or confessions they've extracted themselves..and taken the liberty of extracting themselves, and where does it place you as a lawyer, but there were moral issues on a daily basis. But I don't think anywhere in the world was it as exciting and as meaningful to practise law at that time. And as I said we were...we did four major Treason Trials, all of which, and they were the leading Treason Trials...

Int ...of the 1980s?

FH ...And people were acquitted on every one. The only one we would almost certainly have lost was in 1991, but all the accused escaped from jail, so... *(Laughter)*.

Int What were the names of these Treason Trials? What were they known as?

FH There was the Maritzburg Treason Trial, largely UDF leaders, there was the Alexandra Treason Trial, Moses Mayekiso, and those ones, there was the...we were not involved in the big Delmas, but we were involved in another Delmas...

Int Ok. The Delmas Trial was with George Bizos and others.

FH Ja. We did a number of political trials. We did a political trial...we did some...the harshest ones were the...were the MK trials, er...we were fighting against the death penalty. Fortunately, I don't think that anybody that we defended was ever executed, mostly because in 1992, the death penalty was suspended. But Peter Harris had a case where the accused, Umkhonto veterans from the Northern Transvaal, refused legal

counsel, so we brought in ways to argue on the death penalty's, Friends of the Court. And Denis Kuny gave an absolutely brilliant presentation which essentially earned the accused the life sentence...death sentence.

Int So you were still involved very much in political trials, etc, right up to the 1990s, at what point did the transition actually impact your career trajectory in taking a different...?

FH Well, you know, from the late 80s, the other phenomenon which we got deeply involved in, was the Third Force activities, assassinations, vigilante activities, assaults and massacres. I spent much of the late 80s, early 90s, involved in KwaZulu-Natal with the KwaZulu massacres, and trying almost to interdict a civil war, but which is another whole set of lessons which would later inform some of the work I do now. Um...but people like Peter (Harris) and Azhar Cachalia were deeply involved in the issues around the police and the mass protests, the Sebokeng massacre, Boipatong, and...um...But gradually we got drawn increasingly into, and I was certainly essentially drawn into negotiating the new Constitution.

Int Right.

FH And then there's a kind of creep, really start off working with the ANC on morals, and new legislation, and then discussing, kind of, human rights provisions, and then into the actual multi-party talk...CODESA first, and then multi-party talks.

Int Right.

FH And even as and before, in March or April 1994, preparing new legislation, legislative drafts, I was also involved in (inaudible) the policy work (inaudible) the new police, policing force, police force structure, and so on, so...I think for both CALS and Cheadle Thompson & Haysom, the issues began to...moved out of almost criminal law towards a much more constructive forward-looking process and conceptualising and drafting the legislation.

Int From Cheadle Thompson & Haysom, were you the only one that really went into the CODESA negotiations, and worked with Arthur (Chaskalson)?

FH Just about all went, in some respect or another. Halton (Cheadle) was involved later on in the Human Rights Committee which was established for the constitutional negotiations, Amanda Armstrong was involved in the media negotiations, Ian Phillip, Azhar (Cachalia) was involved in some aspect or another. Peter Harris was very engaged in the National Peace Accord, as was Norman (Manoim). So people who are...I mean people were drawn into almost every aspect of it and at the same time providing support in different ways.

Int And you said that the decade of the eighties was an extremely exciting time, both for you, but also for the kind of political lawyering that was happening. It seems to me that...certainly that early period of the 1990s was particularly exciting for you, and other lawyers as well, in terms of the kind of progressive role you could play in setting up the Constitution and other litigation policies...?

FH Ja, it was great actually, I mean, I think actually there's a limit to how much time you can just spend fighting, and to morph into a more creative role, and it's also quite inspiring...it's an inspiring role in trying to imagine the future. And I often say about South Africa, a couple of things, I mean, we looked for a South African solution, but we were shameless in borrowing the best from the world, so we went around, looked at...we were determinedly comparative, looking for the best and looking...trying to avoid the mistakes of others. And all the time guided by the vision that we wanted to create really the best Constitution that there was. I think we succeeded actually, to some extent. Something which I'm not sure South Africans really appreciate now, but if you go elsewhere in the world...

Int Of course.

FH ...People regard it as the high point in constitutional law, both methodologically and in substance.

Int Absolutely, mm. And was this the point at which you had to work very closely with Arthur Chaskalson?

FH Yes.

Int I wondered whether you could talk a bit more about that?

FH Wonderful! Arthur (Chaskalson), you know, when you first engage with him is...can be quite intimidating because he's both proper and...on the one hand, and on the other hand so...he's...he's kind of wise, his comments are considered, and I think I'm a bit looser on both of those.

Int (Laughs). Right.

FH But Arthur (Chaskalson) and I ended up working very closely on the first draft of the possible constitutional model for submission, and wonderful to work with him. Utter professional, a real human being and guided and informed by his own way of deep and lasting realism, I think...

Int This is also the time when you really began to work closely with Nelson Mandela, would that be correct?

- FH No, I didn't really, I mean I was working much more closely with, to some extent, with Thabo Mbeki, but perhaps increasingly closer with the ANC's Constitutional Committee. Thabo Mbeki more on the National Peace Accord and some of the Constitution but increasingly with people like Mac (Maharaj), and Cyril (Ramaphosa), and Baleka (Mbetse-Kgositsile).
- Int Was there ever a dilemma with the fact that Cheadle Thompson & Haysom...and the LRC...may in fact have to take on cases against the very same people that you were working so closely with in the ANC?
- FH I had the big one.
- Int Ok. (*Laughs*). Tell me about it.
- FH It was fraught...I was consulted by the Methodist Church, to defend and extract Stompie from the custody of Mrs Mandela...
- Int Ok...
- FH ...Which involved both legal and non-legal approaches and engagement, it was really awkward. It was awkward partly because...it was also awkward for my interlocutors, and it involved me going to Lusaka to speak to Oliver Tambo. But it was particularly awkward for me, because the...I'd been...was so unaccustomed to, kind of, engaging, as it were, I suppose firstly, with the things...engaging firstly with the fact of his abduction and probable murder, for which people who I had held in high esteem were, at least in some senses maybe responsible, but secondly, to see how difficult it was for the ANC itself, to deal with the problem.
- Int Was the dilemma for the ANC to do with the fact that there was this denial of the process of ...of what had happened?
- FH Ja, well there were mixed messages, you know. Look, there were, you know, even in that period, there were people who fell short of the mark, and there were people who rose above the mark, notably (inaudible), Azhar Cachalia, and others, who really stood up against...stood out against a number of people who wilted, and I could tell you all of those who wilted but er...I'll try to dodge the issue.
- Int Right, well, I'll let you dodge the issue, Fink. (*Laughs*). At what point did you...once the Constitution negotiations and the litigation policy-making around that was under way, what were your next steps, did you go back full time to...?
- FH I didn't really know, I was quite open, I didn't know maybe, I mean, there's a kind of sense in that your, sort of, life-long dream is accomplished, what do you do, you know, do you realise that actually maybe your challenges lie ahead and somehow

engage, either in government or even in politics. I had originally thought I might go back to politics, (inaudible) people advised me and said: no, actually the real...the...everyone's clamouring to go to Parliament, why don't you make yourself available to go into politics with Sydney Mufamadi. And then...or of course calling it quits, you know, go and do all those things...going to do all those things you didn't do, like study overseas and maybe even make money and...

Int Sounds like a watershed for you?

FH Ja, although I kind of quite smoothly and effortlessly just er...I was approached almost immediately to go and become (Nelson) Mandela's Legal Advisor...joined him within the first month, so...

Int So this was 1994?

FH Ja.

Int Right. And at that point you began to work quite closely with Nelson (Mandela)...?

FH Yes, I worked in his office, so, I mean, it was...for the first two years I was...while performing the task of a Legal Advisor, Constitutional Advisor and the Committee of Constitution, I was also engaged in the actual final constitutional deliberations, the drafting, and so on. So that kept me busy. Um...and there were some high points and low points. And, I mean, a tough point was a very tough trial on the SAFU Case where the South African Rugby (inaudible)...

Int Right, ok.

FH ...And I spent months both preparing that trial, and it turned out to be a crushing victory for us. But it went through a very low period because the court held against (Nelson) Mandela including an credibility file, all of which was reversed at the end of the day, but...And around about 1998, '99 (Julius Kambarage) Nyerere had requested stuff from government to, sort of, provide him with some assistance in the short term, with a Legal Advisor, a Constitutional Advisor, a negotiator, to help with the...his role was facilitating Burundian Peace Talks. So I went up there ostensibly for two or three weeks, but I ended up going back there for three and a half years...

Int So what period did this extend from, '96?

FH '99...'98 I went up there and it was initially a couple of weeks every two or three months, but from about 19...from about 2000 it was, sort of, six months of the year. And it made it very difficult to move into a, kind of, an alternative profession. So I started just doing more of it elsewhere. So when I wasn't in Burundi, I'd be in Sri Lanka, Indonesia, eight or nine trips to Indonesia helping...advise on their

constitutional reform and the Sri Lankan Peace Process, and Burma, I got quite engaged in (inaudible) Beirut, advisor on Electoral Laws, and Nigeria, and decentralisation, the new Constitution, democratisation and then...I had to, kind of...give me basic work in South Africa, I'd taken up a kind of loose consultancy with Pravin Gordan to work on...and eventually I must say, I..

Int Was that in the Treasury?

FH It's in the...the Receiver of Revenue.

Int Right.

FH And helped them establish an informal system of dispute resolution, and on tax disputes, which I really did quite enjoy. And it was quite a nice environment, it's an utterly professional environment and a very political one. And I think it's one of the success stories of the South African transition.... But then I got involved in the Sudan, after the...after the Burundian Peace Accord was signed, and spent two and a half years negotiating the Sudan North/South Peace Agreement, and almost as that came to an end, or shortly afterwards, somebody asked me if I would go and work in Iraq and do the same thing, so I went to Iraq.

Int Were you doing all of this as an independent consultant?

FH Ja.

Int Ok.

FH Which is tough, no institutional backing, you're on your own, tough on your relationships, marriage fell apart, kids were not happy. Once you're in it it's hard to get out of it. You're largely on your own, no kind of collegial assistance.

Int Mm.

FH At least personal assistance, but in fact once you're in each one of these endeavours...it's not only a new group of interesting people that you engage with, it's new sets of issues, a whole new problematics, you relearn everything you were so certain about when you came out of the South African experience, has to be rechecked and revised. So I'm pleased to say I've spent the last ten years really learning, it's a wonderful thing.

Int And you stayed in Iraq for how long, Fink?

FH Sorry?

Int How long did you stay in Iraq for?

FH Iraq was about another two and a half years, and then I came here from that, so it was about two and a half years in Burundi, two and a half years in Sudan and about two and a half years in Iraq and...ja. But in that time, cumulatively, you know, fit in another two years of work in between the spaces, in...in Indonesia, Burma and Somalia and...

Int Mm. At what point did you start at the UN then, officially?

FH I went to Iraq, was my first...I'd done consultancy work for UNDP and other things in East Timor, and somewhere else...Somalia...But my first employment, by the United Nations system, inaudible by the UN, I joined them in Iraq to head up the Constitutional Support Team, and I was there until...until I came here. I then decided I'd go back to South Africa and go and see if I...around about after I'd been there about a year and a half.

Int So this is 2005, maybe?

FH I went from 2000...I started in 2005.

Int Right, ok.

FH And in the middle of 2006, I'd decided to go back to South Africa. They asked if I would stay on in a consultancy capacity and I ended up basically staying on full-time, the consultancy eventually became a full-time job. And so I continued with that for another year, and then I was asked to come here. By that stage, and quite frankly, I think the Iraq Constitution initiative had run its course, at least for them, if I'd stayed on, I'm not sure I would have had...I was as...ja, I had accomplished as much as I could do, I think. And I think to this day not much has happened since then, and I think in several months time the thing will come up again, for renewal, or for engagement in a grander social inaudible.

Int So, your reasons for going back to South Africa?

FH When?

Int When you were in Iraq.

FH Ah, there were relationship issues, I mean, I think there's just so long that you can spend living on your own and still have to have a relationship, it didn't work out. Also I think because I hadn't really dismissed the idea that I wouldn't be working in South



Africa, Cape Town was my base and I moved around the world, sharing what I'd learnt in other parts of the world with South Africa and coming back to South Africa where my kids were...to...I had to, sort of, take time to make the decision to take a job, to make the kind of break which I suppose....

Int Politically...what were your reflections on South Africa from the time you left to work in Burundi...say from 1999?

FH Ja...

Int And that's really the end of (Nelson) Mandela's time as well, and Thabo Mbeki had taken over.

FH Mm.

Int I wonder whether you could give your sense, your reflections, and what...what are your concerns about what's happened since 1999, to now?

FH I don't...it would be a bit presumptuous for me to give a detailed critique of (inaudible)...

Int Well, as a South African who's been deeply involved, I'm wondering...?

FH Ja, I've watched it, I must say I'm usually, when I get back to South Africa, quite depressed. To pick up the first Sunday Times and to read both the tone and the nature of the scandals the Times are writing, and the political rhetoric, seems to have fallen short of where it was when I left. Hey, you've got to be a little bit realistic and, I mean, I have to tell you that frequently I do sit outside the country and marvel at what it's accomplished. And I'm always a little put off by the culture of complaint when I get back. But I can't deny that I'm also...get a little depressed by, in a sense, how it's fallen short of...and maybe recognise that I was there in a Camelot period.

Int Do you think that this is...the sort of the falling short of the mark, can be attributed to particular leadership qualities, or deficits, or do you think it's just the nature of transitional societies?

FH A bit of both, I mean I think you have to normalise at some stage and move...you go through the honeymoon period, and perhaps I was there in the honeymoon period. But I'll tell you what, there was such capital in that country, human capital, relationship capital, it seems to have dissipated since I left. But I think that's true also for our institutions, both the, you know, the corporate institutions of public life, like Eskom, and so on, to see them actually run down in such a short period, is indicative of something deeper, quite frankly, you don't...one doesn't do that to the...But also the harder institutions, the judiciary, there's kind of a sleight of hand towards really quite

important social institutions. I, quite frankly, think...I mean, which again...there's been a kind of de-racialisation of the enormous inequality, but there hasn't been a great reduction in that inequality. I'm not an economist and I think there is a huge accomplishment of South Africa just to maintain, and to grow its economy in really quite difficult, global conditions. I'm just not sure we've done enough to close that gap. And I think we could have...A way of doing that, would have been through a broader patriotism and through this, on the one hand, almost quite petulant racialism which comes from the top, combined with the most right-wing economic policies, I mean, it's a...well...And a stratagem premised on really enrichment...

Int Self enrichment.

FH ...Really relative few. Now it doesn't mean to say...I think South Africa needs, I mean, I'm sufficiently...become sufficiently perceptive to realise South Africa needs a...a strong middle class, you know, a middle class is very often the driver of growth. It should be a productive middle class, not a parasitic middle class, which is what I think happened in Zimbabwe. But having said that, I think it is capable, through a kind of patriotic drive, of milking the cow on the way, which (inaudible) a little bit further. But you can't do it by hectoring people, you've got to be involved in a...in a national process. The more I've seen in other places in the world, I recognise the enormous strength which diversity brings, and each...ja...which a coherent National Government can bring. I even think in South Africa.

Int South Africa's really fortunate, and correct me if I'm wrong, by having this amazing advanced Constitution, it really protects...

FH Ja.

Int ...But at the same time, in terms of rule of law, what are some of your concerns about the judiciary, and perhaps political machinations...to perhaps change the nature of what's been set?

FH I think it's an advanced Constitution, I think the Constitution is...it's like the LRC, are particularly important in trying to make the Constitution deliver on its promises and I think the social benefits of it delivering on those promises are much greater than people recognise.

Int Right.

FH Unfortunately, I've detected a kind of arrogance in government, and a real chip on their shoulder about being confronted by judicial challenges.

Int Absolutely...

FH Which is really quite different to the legacy which (Nelson) Mandela left, and I would like to think I played a small role in creating a real respect for law, and an example, including putting up his own party's laws for constitutional adjudication when there was doubt about them. One of the institutions I really fear for...the courts, and I think that the robust re-staffing of the courts, without regard to quality of the people, even...it's not just a...it's been a sort of racist endeavour, I mean, there's good reason to actually require hardness but almost penalisation, not of whites but of whites, quite frankly, with a progressive legal understanding.

Int Interesting!

FH And we saw it most...I think, most clearly with the really rough treatment metered out to Geoff Budlender. That judiciary would have been blessed...Geoff (Budlender) would have been a jewel in that...and that he would offer to go there and not make money at the Bar was a real...was a real...gift, which South Africa should have accepted. I'm worried about...there are other things as well, I mean, I think that if you don't treat the judiciary with respect, it's pointless, and people don't want to go there. People don't want to go there and then basically people who are out of work, advocates, take appointments and those who are successful, don't. And I think South African Constitution places the courts very much at the centre of the adjudication of social disputes, so it's an institution, which has a critical role to play. And you've seen in Zimbabwe what happens once the courts no longer are a mediating mechanism? Well, we'll see what happens there.

Int In terms of the...the LRC, in particular, in terms of Public Interest Law work, what do you think the...the real needs are in South Africa and what direction do institutions like the LRC and other smaller ones that have emerged...

FH Ja.

Int ...where could they be positioned in relation to those needs?

FH Well, I...I...you know, I'm not...I mean, I think they've got it just about right, I mean, I think they have to situate themselves with somebody who offers to make real the promise which the Constitution has...makes. It will be harsh, the government doesn't like being told what to do by the courts, and by the way, I'm not unsympathetic to the government on that...

Int Right.

FH ...I mean, I don't think judges are the ones who should decide how the budget should be spent, I don't think, necessarily, the judges know how much money should be spent on health as opposed to education. And I think that your political choices must be made by politicians, not judges. So I'm still a democrat in that...in that respect, but the truth is what the legal form does is, it imposes a discipline on democratic

structures, both in the way you make decisions, and in the factors you take into account. So when you spend all your money on arms and nothing on education, the courts can say, not, this is how much should go on education, this is how much should go on arms, but they can say: listen, the Constitution requires you to think about other things as well. So there's a level at which the Constitution should intervene, and I think the Constitution is relatively nuanced in saying when courts have a soft supervision, and then in a more immediate, to directing a hard supervision. So...that's what the...and the LRC...there are no publicly funded political trials, the LRC is the one institution which provides access...I think there's tough times ahead, it's going to increasingly have to rely on South Africans to fund those institutions, and South Africa doesn't have a culture of voluntary giving.

Int That's true. In terms of the LRC having to take on the ANC, take on government, it's developed a reputation somewhat as having to do that with the TAC case, and others, especially forced removals, etc, I'm wondering what your sense is of...how it can continue to operate, as a Public Interest Law firm, on behalf of the people, against government, without necessarily...

FH ...Becoming oppositional?

Int ...Exactly.

FH I mean, I think that's its challenge. There may be times when the government...no, I think government should have a slightly different approach, if I were in bloody government I would say: listen, every time you find a corrupt guy, that's good for you, you're purging your own institution, every time you do something wrong and the courts say...that's great, you're learning...you did it wrong, so you should welcome judicial review of your performance and activities. Secondly, there may be areas...the obvious one is the death penalty, where government can say, courts tell us how much, how far do we go, in providing an AIDS treatment, given the expense, and so on. And the death penalty...I...I think that would be a difficult one, because, you know, don't...don't ask me to quantify in rands and cents, but you can...you can go to the court for guidance, in a way, which...the courts and the LRCs and people like that can take up cases, as it were, which government would like to see enforced but can't, maybe there are issues around. Let me give you an example. Information held by private sources of power, the LRC could be engaged in that kind of work. Ensuring that people get their wages paid, farm workers, and so on, that's a lot of issues in which government could intervene, not every case has to be against government.

Int Sure. Heading towards the end of the interview, I'm wondering, the legal firm that you set up, I'm wondering what the changes have there been for you looking from the outside in?

FH Sorry, which...which company?

Int Cheadle....

FH Cheadle Thompson & Haysom?

Int ...Thompson & Haysom, exactly. What...what's the nature of the work it undertakes now?

FH Well, they had problems too, I mean, they're not immune to it, of course they've had to survive without public funding of political trials, they've had to survive, to a much greater extent, on even government work, and municipal work, in the policy field in drafting legislation. They didn't, as it were, inherit the fruits of having served the winning party, by getting its corporate work, no, that went to the old corporate lawyers who did work for the apartheid (*laughs*) regime. So...and I think that's quite...ja, maybe quite fortunate because, in a sense, you've had to rely on your strengths. Cheadle Thompson went into media work, it's largely a black firm now, a black-led firm. It has remained and retained its trade union base, so it still is the pre-eminent trade union law firm. But the trade unions increasingly did a lot of their own legal work, so you really come in only on the most specialist...and basis when litigation is required. Ja, those...those were the challenges it faced, I mean, let me...the challenges it faced is...and continues to face is that you need...a firm like Cheadle Thompson & Haysom, which used to have its work, sort of, let's say, it's not quite accurate, but let's say it divided between clerical work and trade union work, now between trade union work and other work. The problem with trade union work, if you take on as a...your major clients, the trade unions, it's very hard to take on any fee-paying corporate work, because they are potentially in opposition to your trade unions, the workers in those factories. And so it's not only...I'm told by somebody, I was there recently, that they continue to have dramas played out within the firm, with people saying: but I want to represent A, and they're saying, no, you can't, because we represent the workers of A, and...

Int Um...

FH It also happens at a government level too, because you represent the municipal workers and then you might be doing work for Johannesburg City Council.

Int It seems to me the LRC doesn't really face that problem?

FH Yes, it doesn't because it's never really taken on trade unions, as such, it's taken on workers' issues.

Int I'm wondering...?

FH ...But where the...the LRC has its problems is, you know, I think it often has this dilemma of who to represent, somebody really indigent, or is it a kind of cannot represent, there might be a great human rights point.

- Int Exactly. And I think certainly you're right, it does, in terms of the average person who comes in with a dilemma as opposed to a test case. I'm also wondering, and I think you can speak to this having been a part of Cheadle Thompson & Haysom and having left, the LRC similarly has had Arthur Chaskalson leave, although he's come back in a different capacity, and Geoff Budlender leave, and the key people that really made up the LRC, Charles Nupen, etc, they've all left over time, and so in a way, there's this organisation malaise, when there are new people and you're unfamiliar with them. I'm wondering how an organisation in South Africa which...it's really undergoing myriad transitions, really comes to term with that kind of change, with new blood, etc?
- FH You know, it's quite difficult. I mean I looked at some of the literature on transitions in Eastern Europe. In a sense they face many of the challenges that embryonic civil societies...worst in Eastern Europe, and all their persons are taken up into government. And you had a kind of temporary collapse in civil society-type of institutions. South Africa is perhaps even more the case, people (inaudible) didn't, I mean, went into National Government, Provincial Government and Municipal Government, the civil service, and they went into business, and so many of the civil society institutions were gutted of their leaders. I think it actually comes from there, it's a temporary phenomenon.
- Int Fink, I've asked you a range of questions and I'm aware that the time is...there are two things that I would really like to ask, one is, are there really pressing issues that you feel I've neglected to ask and you think...ought to be part of the Oral History of the LRC and Public Interest Law more generally in South Africa?
- FH Well, it's more the question of, have I adequately answered all your questions you asked?
- Int Well...
- FH I don't know, I mean, we haven't really...didn't really pick at some of the issues around where South Africa's going and I'm quite happy not commenting to that. The legal thing is quite important, the two or three times I've been back recently, people have been really quite despondent, I don't know...have you been back?
- Int Yes.
- FH You must have encountered the same?
- Int Yes.
- FH Um...in particular the (Jacob) Zuma and the (Thabo) Mbeki dispute, and the crisis in the sort of ANC, over the judiciary, has raised for me the real prospect of, you know, much of the damage that is going to be done in that dispute, will be done to the

institutions which just seem to have taken place or are seen to be positioned in favour of one or the other, and it's definitely affected things like the Scorpions, the Police and the Courts. And I was a little worried by the expedient way in which people choose to (inaudible) you know, judges in the courts, and what happens in the future.

Int In terms of memories, you've lived through rather exciting times, I may say, what is one of your fondest memories of this time that you'd like to share with us? A story perhaps?

FH Ja. Well, ok. I must tell you almost every major legal case that you win is a wonderful moment. I say it's a wonderful moment, but it...law is an extraordinarily unrewarding occupation, you really do get one day of a real sense of triumph and satisfaction for hundreds of days you engage...it's pretty frustrating pretty often, quite tedious (inaudible). The day (Nelson) Mandela was inaugurated as well, a wonderful moment. I don't know... (inaudible) most of it.

Int You continue to have a close relationship with Nelson Mandela?

FH When I see him...I don't see him enough now, I'm not in South Africa and I saw him six months ago, like last year, ja, ja.

Int In terms of the work you do now, do you think other places in Africa perhaps, or the Middle East, etc, that they maybe lack certain things that South Africa had?

FH Oh ja, that's almost always the case, (inaudible) conference, I don't know, I could lecture you about that, but I...I'm one of the few people who can lecture you about it, because you don't know what South Africa had until you've gone to countries which don't have it.

Int Sure.

FH You know, even (F.W.) de Klerk was an enormously important capa...the capacity that you could have people outside of the table who largely embraced the other people on the other...same side of the table, just almost lifts South Africa into unique. You've just got to go and try and do the negotiations in the Darfur to know how important that is. But above all, you know, it was a...it was a case in which both parties were really willing participants in that process, they may have had different expectations of what they wanted out of it, and that is almost unique. And strangely there's a much greater degree of...a common discourse of patriotism, than you'll find in Sri Lanka. I mean, people will deny, in those two countries, that they even have a common destiny with the other guys on the other side of the table, we don't share your destiny, we have our own destiny. In South Africa it was...had...and it had the leadership of (Nelson) Mandela. It's not uncommon to go to these countries and have people say to me, what we need is a (Nelson) Mandela; they said that to me in Iraq constantly, er...

Int Fink, thank you ever so much for your time and your reflections...

FH No, not at all. It takes me back.

Int ...Really appreciate it.

FH Hell, it's a long time. You forget, it seems like the other day, but it's twenty, thirty years ago.

Int Does it feel like the other day...

FH Ja. Ja. I'm not sure I was as articulate as I ...?

Int Oh, you were absolutely fine. Thank you.



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