Lourens (Laurie) Ackermann   Constitutional Court Oral History Project
6th December 2011

Int This is an interview with Justice Laurie Ackermann, and it's (6th) December 2011. Laurie, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

LA It's a great pleasure.

Int …not having had the opportunity to interview you before, I wondered if…you could talk about early childhood memories, where and when you were born, and also events that may have in some way, prepared you for the legal trajectory that you took…?

LA I was born in Pretoria on the 14th of January 1934. Both my parents were Afrikaners but they believed in being South Africans first, and Afrikaners second. And from the cradle I was brought up bilingually and bi-culturally in the sense that I spoke both the European languages, English and Afrikaans, and imbibed a dual culture from childhood. I don't think I ever wanted to be a train driver, but at the age of six, I decided that one day I wanted to be a judge. Why that happened I don't know, but I suspected my parents had one or two friends who were judges or who were about to be judges, and they made an enormous impression on me, and so I suppose that was the first influence on me. And thereafter, I always had as an ultimate career goal to be a judge. The idea of constitutionalism and a Constitution with a Bill of Rights of course only entered the picture much, much later.

Int In terms of growing up in South Africa during apartheid, what was your sense of the disparities; at what point did you become aware of the differences?

LA It's very difficult to answer that because one's memory can be deceptive and you think that you thought things that you didn't think. But I think I can say that it always appeared strange to me that black South Africans lived in separate living areas, in economic conditions that were vastly inferior to the conditions in which my parents and other whites lived. And it was a feeling of uneasiness. I wouldn't put it any more than that, but I suppose that in my early years, in my teen years, I sort of absorbed the dominant white culture and took for granted that that was how things were, and that is how things would be. And I suppose my eventual rejection of apartheid in all its forms was really a slow process, which started in my early adult years and culminated in my early middle years, and it was a journey that was both philosophical and also theological. I started reading Immanuel Kant again, and I'd come to religion late in life, well, in my mid thirties, and what made a very big impression on me was if it was true, which I accepted that it was, that all human beings were

created in the image of God, then there was no justification for either the state treating human beings differently or human beings amongst one another treating one another differently. But it was a slow progression, and in the early years of apartheid I certainly was not an anti-apartheid activist or very involved in it, as other people may have been.

Int I also wondered, in terms of your high school background, you mentioned that the legal world had impressed you from an early age, was that something that you carried through from high school into university?

LA Yes.

Int I wondered if you could talk about the trajectory you took at university and your experiences at university?

LA Well, perhaps I should point out that in the bilingual tradition and bi-cultural tradition I was sent to an Afrikaans medium preparatory school, and then to an English medium government school, that I still regard as one of the best in the country, and that's Pretoria Boys High. And thereafter I did my first four years' legal study at Stellenbosch University, and thereafter two years at Oxford. I then returned to complete my South African law degree at Stellenbosch. The task of being judge seemed to me to be a very responsible and a very honourable one, particularly in the area of settling disputes between people. It made me uncomfortable when people had disputes or when my parents had disputes, and I suppose that rubbed off on my career path. And the law seemed a very interesting profession; quite apart from the ultimate role one might play in it.

Int You also mentioned this slow and steady awareness of apartheid, and I wondered whether during your university years at Stellenbosch, and particularly at Oxford, whether a sense of being a white South African became more predominant...

LA Well, I think the biggest change probably took place at Oxford. I went to Oxford in 1954 and tat made a very big impression on me. At one stage at a Stellenbosch University, I still believed that if one could have total separation on an economically and geographically equitable manner, this could be justifiable. But when the Tomlinson Commission's Report came out, I think in the early or mid fifties, and it spelt out what was required to make separation really equitable, it became clear that it was simply not possible. And it was not as if I had a great Damascus experience; but apartheid just didn't seem the feasible or the justifiable way forward. At that stage I wasn't clear as to what was the way forward and that grew gradually during my practice at the bar. And the person who made the single biggest impact on me was in fact Professor Louis Henkin of Columbia University, whom I met in 1983. He was

one of the truest and most open-minded people I ever met in my life, and a world authority on human rights and a human rights activist in the United States. And I think his very clear way of thinking probably played the biggest role in my total rejection of apartheid. So much so that in 1986 I felt that it was not much good having a Westminster type Constitution where Parliament was sovereign. I felt that there was very little the judges could still do to ameliorate the impact of apartheid, and I was consequently instrumental in founding the Human Rights Chair at Stellenbosch. It really came as quite a surprise to when both the donor and the university approached me to become the first professor. I eventually decided to accept the offer. The State President (PW Botha at the time) wouldn't give me permission to retire from the bench, so I had to resign, which involved the loss of my pension. I inaugurated the Oppemheimer Chair in Human Rights Law in September 1987.

Int At some point during this period you also were involved in negotiations with the exiled ANC, and it's such a historic moment, I wondered whether you could talk about that?

LA Yes, one's memory is vague but it took place in 1989, and there were four meetings that year. The first was in Harare, in Zimbabwe. The second was at Oxford, the third was at Columbia University in New York, and the fourth was in Paris. A number of internal South Africans, who were very committed to the necessity of constitutional change at the earliest opportunity, met with the, loosely called, ANC constitutional desk in exile. I must say that the first time, when we travelled to Harare, it was rather a nervous because we thought that some of us might be arrested (*laughs*) when we arrived back. But nothing happened. I am not sure whether our meetings had a significant effect on subsequent events; perhaps historians and lawyers in the future will be able to make an objective assessment. I think they did because on both sides there was a misperception as to what the constitutional stance was of the other side and I think it cleared a lot of misunderstanding from the table. There was a change in attitude on other sides. There certainly were some remarkable changes amongst representatives of the ANC towards judicial independence and the idea of an independent Constitutional Court. So those were heady days. There was some rumour at the end of 1989 in November, when we met in Paris, of the possibility of (Nelson) Mandela being released in the future, which was rejected by everybody as simply impossible, inconceivable. And lo and behold, three or four months later, it actually happened.

Int I also wondered, Laurie, you had already started serving on the Bench at a certain point, in the 1980s…

LA Yes, 1980. I was permanently appointed in 1980, October 1980, during apartheid.

Int And what was the difficulty for you in terms of during that decade, given that it was the height of repression with the slew of Emergency regulations; I wondered the difficulties and the challenges and operating on the Bench during that period?

LA Well some are historical and some are quite familiarly personal. I'll mention two of them. It seemed to me that whenever a fair and a just gap could be taken through apartheid legislation, the moment it was taken there'd be legislation to stop up the gap. And one was becoming more and more…I don't know how to describe it, a sort of a figurehead, a person with very little real just control over, for example, a criminal trial. And a highlight for me was when there was a new Judge President in the Transvaal who allocated political cases across the spectrum of judges, not just to those who were considered politically "safe". Previously I had never had a treason or a terrorism trial because I was probably considered too left, or liberal, or progressive, or what have you. But with the new Judge President, he very properly allocated them as they came and thus I was landed for the first time with a terrorism and treason trial, in which the defence counsel were Iain Farlam, who subsequently sat on the Supreme Court of Appeal, and as his junior Edwin Cameron, now a Justice of the Constitutional Court. And the exposure to that trial brought home to me, very acutely, how little space progressive law and progressive ideas still had on the bench. At the time I took my decision to go to Stellenbosch, early in 1987, change still seemed very, very, very far off. I mentioned the fact that at the end of '89, the ANC laughed at the suggestion that (Nelson) Mandela would be released soon. My wife also played a role in it because at the time that I was presiding in this treason trial, she was invited to form part of a group of internal South African women to meet the ANC's Women's desk in exile. She appreciated this glorious paradox and dilemma, and asked me what she should do? I said, "Well, you must do what you want to do". She duly went. So, that highlighted for me, and I don't mean this in any jocular sense…the absurdity of the whole situation. And the reason I resigned to take up the teaching post was that I thought it would still take a long time before people were prepared to think in terms of a rigid, a Bill of Rights entrenched Constitution. But things happened far more quickly, and after 1990 the political parties started negotiating with one another directly, and I'd never had any real political involvement with any party. And then in 1992, I thought, well, things are changing so rapidly, it's time for me to go back to the bench, and in 1993 I was accepted back onto the Cape High Court. And from there in August '94, I was appointed to the Constitutional Court.

Int I was wondering, just prior to that, were you involved at all in terms of the Constitution making process?

LA No, I wasn't. Not at all. I'm busy writing a book at the moment, which is nearly completed, and I speak about the fact that I hold the Constitution in very high regard, and I make the point that, not having, been involved after 1989 in any

of its drafting process, I feel I'm in a position to take an objective view of the great narrative, our Constitution.

Int I also wondered, in terms of the election process and the electoral process, were you involved with that?

LA Well only in the sense that I was, in '94, chairman of the Western Cape Electoral Appeal Tribunal, which had fortunately very little work to do. So that kept me busy for a few months.

Int In terms of your appointment, you were one of the sitting judges that was appointed, I wondered whether that came as a surprise to you, the fact that you were appointed?

LA Yes, it did come as a surprise but I had always been on terms of good friendship with some of the role-players, who would have been consulted before the appointment of the judges took place. And, you know, rumours circulate before the time, so I was quite excited about it, but it still came as a great surprise.

Int In terms of your memories of the initial period, the first meeting that you might have had, I wondered whether you could talk about some of your memories of those early experiences?

LA You mean, with the ANC Constitutional Committee in exile?

Int Okay…

LA Well, after the initial suspicions were cleared out of the way, they became very relaxed and quite informal. I don't consider myself to be particularly astute in Realpolitik, so I may view it through rather naïve spectacles, but I thought that there was integrity and intellectual openness and trust in the discussions that we had.

Int And then in terms of your actual appointments, were you familiar with the other judges that had been appointed, both the sitting and the selected judges for the Constitutional Court?

LA Yes. I had, for example, got to know Justice (Pius) Langa during his involvement in with the Democratic Lawyers Association (National Association of Democratic Lawyers) and other things. And I had spoken, on his invitation, at one or other of their conference; I certainly knew him. I knew Justice (Kate)

O'Regan vaguely. Justice (Johann) Kriegler I had known well since primary school. John Didcott I knew well. Justice (Ismail) Mahomed I'd known quite well. I had not met Justice (Yvonne) Mokgoro previously nor Justice (Tholie) Madala. Justice (Albie) Sachs I met for the first time in January/February 1989 in Lusaka. But of course I had got to know quite well through his banned writings.

Int And you'd known Arthur (Chaskalson), I suppose.

LA Oh, yes, sorry, that's most important. I'd known Arthur (Chaskalson) for many years, and in fact he was one of the people that I consulted before I left the Bench to take up the human rights chair. And I think…I guess, and it's simply a guess, with no evidence, but I guess that Arthur (Chaskalson) had more than a middling regard for me and that probably my appointment to the Constitutional Court was due in part to his attitude and his thinking on the matter.

Int In terms of your memories of the inauguration, and actually prior to the inauguration, the actual first meeting of the Constitutional Court judges, I understand that there was a very long agenda for example…?

LA Yes. Yes, well, that, it's also some years ago, I think that was very soon after all the members of the Court were appointed and I think the interviews and the appointment of the other members had taken place. I think by the middle of October 1994. And I think we had our first meeting in the temporary Court buildings before the end of the year, when the entire library for the Court was shelved in two small little bookcases, and there was no furniture around and the Chief Justice's, then the President's chambers, were very sparsely furnished indeed. I remember one of the first things that we had to work on was the drafting of rules for the operation of the Constitutional Court. There was an early debate about whether we would wear gowns at all. I think Justice (Arthur) Chaskalson felt that we shouldn't wear gowns; we should simply sit in civilian clothing on the bench. Butt by a large majority he was outvoted. Many of the decisions were not big ones, such as what we were going to be called in Court and out of Court. Whether it would be the Honourable Mr Justice and the Honourable Madam Justice and whether you would be addressed as Milord and Milady in Court, and it was decided right at the beginning, and contained in the first rule of practice, that the judges would simply be addressed and be known as Justice A, B, C, D and F, without any gender distinction.

Int Speaking of which, your prior experience on the bench…(*break*).

Interview resumes after a brief intermission

Int Laurie we were talking about the early days of the Court and you had served previously on the bench and I wondered, the Constitutional Court Bench, it's regarded as having people from various backgrounds, and certainly Sydney Kentridge has commented on that, on the collegiality despite the differences in background, and added to that you also had women colleagues. I wondered if you could talk a bit about those differences and how you achieved consensus despite the different backgrounds?

LA That's quite a large topic, but I mean, you're right in emphasising, certainly from my very powerful perception of the collegiality of the Court, not just collegiality in personal relations with one another, which was always at a very high level of respect. I can't recall a single incident where that was breached. But also collegiality in the sense that one realised that it was the judgment of the Court, in every particular case, that counted and that this was an enormously important, enormously responsible task. And that in the beginning with no previous case law guidance in South Africa, and little indeed from elsewhere, one had to try and get it right. And I think the collegiality was strengthened by the fact that we were aware that we were a diverse group of people, that we had broken with Parliamentary sovereignty, that we had the power to declare conduct and laws of the Supreme Parliament to be unconstitutional. And we were anxious that the Court should speak as the Court, not a conglomeration of individuals or necessarily one voice speaking on behalf of the Court, but whoever wrote the judgment that it was seen as the Court's judgment. And I don't think people outside the Court or lay people realise just how much work is involved with a collegial Court of eleven, where everybody had to sit if they were available, and how important it was to try and let the Constitution speak through the judges, not the other way around. And we were aware that we were embarking on a very new task where the whole relationship between the other arms of government was a new relationship and at times a complex one, and that certainly from my point of view, and I think from most of my colleagues, we didn't want to inject our personalities into the Constitution, but we wanted the Constitution to speak. But as we all know, the text only speaks through the interpreter, only has that voice. So I think this is why, particularly at the beginning, we placed such heavy emphasis on comparative law, why we took a great deal of trouble to explore applicable comparative law in other constitutional democracies, so as to reassure civil society that we were looking at objective values and weren't just trying to impose our own subjective views onto the Constitution. That at least was my impression of what we were struggling to achieve, whether we succeeded or not is a matter for others to judge.

Int In spite of the collegiality, you were also regarded as a very strong Court, in terms of having very strong personalities on board, and I wondered how dissent, or disagreement was handled?

LA It was handled very openly. I was previously commenting on how civil society doesn't realise what the demands of a large collegial Court are, and how t you can sometimes spend as much time on the draft judgment of another colleague, as one spends on one's own judgment, because you're responsible for it just as much as the person whose name appears for the judgment. You can't afterwards say, well, I don't agree with this part of the judgment, or with that part, and I really only consented to sign it to achieve this or this. You've got to accept responsibility for the judgment as it's written, and that takes a lot of time, and a lot of consultation, and a lot of attempts to understand exactly what colleagues are intending in their judgment. And that is what takes time. And I don't think people realise this when they see that the Court produces relatively few judgments; they're inclined to think, well that's not a great deal. If they bore in mind that a draft can go through six or seven variations - at more than one conference, they would realise what a complex and collegial task it is, taking up a lot of time.

Int Just to go back to my previous question, I've heard about how the group had very strong personalities, and I wondered how dissent and disagreement had been managed?

LA I like to think through a rational process. It's a jaded word, but it's…I suppose it's all that one has, the power of reason. And I think the importance of memoranda, some people absorb things better when they read it and others have the facility to absorb things orally. And I think one of the ways was that if you disagreed strongly with a view, it was incumbent upon you to justify your views in a memorandum, and to circulate the memorandum to all colleagues, and in this way to achieve as much consensus as one could. But in certain cases it's simply not possible and then you'll have a dissenting judgment or judgments.

Int In terms of the actual relationships and collegiality, did you have any sense of perhaps some racial or gendered tensions within the group?

LA No, I never…I never experienced or sensed tensions. There were one or two occasions when the issue, not necessarily arising amongst ourselves, but when we looked at issues of prejudice, racism in various degrees, and we discussed it openly. This may have been as a result of a perception that there were tensions, and I therefore admire very much the leadership of the person or the courage of the person who suggested, look, let's have an open discussion, not on any particular major tension or incident between us, because there wasn't one that I can recall, but to try and meet one another from our different perspectives on issues of race and gender. I think that there were, in isolated cases, problems with gender, but I don't want to be more specific than that.

Int Okay, fair enough. I also wondered, in terms of leadership, I wondered whether you could talk a bit about Arthur's leadership and the way in which he managed to build consensus?

LA I think Arthur was a unique first President and subsequently Chief Justice of the Court, given the time of his appointment. He was one of a really very small handful of very distinguished white lawyers who had the trust of all shades of the political spectrum. So therefore I think his credibility was enormous, and he built up consensus through discussion. He must have been a very, very difficult person to negotiate against, because I remember that sometimes when he didn't like a passage in my judgment, he would say, would you mind if we put in these words in this particular sentence? And I knew that one then had to be, very carefully, because the impact of a word or two could be more than one thought. Not that he was being deceitful but he was such a skilled negotiator and draftsperson. And he was patient. He kept his patience in the most difficult, difficult circumstances. There were sometimes flare-ups in meetings and some of us sometimes got very hot under the collar, making a point or trying to make a point, but Arthur was always cool. I can't remember a single incident, not a single incident when he lost his cool. And if there had been I'm absolutely sure I would have remembered it. And I think that he led by example in exploring openly and completely honestly the divergent view. My own concept of what a great judge is, one of the criteria, which is very high on my list, is the intellectual and emotional capacity to question and interrogate your own views as objectively and honestly as you do the views of others. I know it's impossible to do it perfectly, but I really mean an absolute unconditional commitment to that way of thinking.

Int Laurie, you'd had previous experience on the bench, and in restructuring and structuring a new Court, what were some of your own personal challenges and difficulties having come from a Court with certain formalities and structure?

LA Well, it was wholly different in the sense that previously one had, for the most part, sat as a single judge, except for judges who had come from the Supreme Court of Appeal, where they had sat in benches of three or five. So the whole mechanics of sitting eleven on a bench, taught one that one had to be very, very patient because there were some of one's colleagues who at times a little more loquacious than others. It tried one's patience to have to wait for quite a long time before you could get in a question. But I think we all tried, some with more patience than others. I'm not a particularly patient person. But I think leadership was very important in those early times, and I think Arthur led by example, both by his patience and by his willingness to debate differing points of view, and taking the lead in it and letting everybody have a fair share in the debate.

Int I also wondered, Laurie, in terms of actually, the method of working, I understand that you had conferencing, what they called work-shopping, and I wondered whether you could talk a bit about those experiences.

LA Well, thank you for bringing my attention back to it. That was of course the biggest difference. A justice was assigned to prepare a draft of the judgment, but many memoranda had to be drafted and exchange in order to convey one' views properly. One had to do far more writing and drafting of memoranda than one had ever done before. And just the whole process of coming together, of eleven minds coming together, even if not in perfect agreement. It took a lot of time and a lot of drafting. And that was a very, very big difference from what one had been accustomed to on the bench previously.

Int Some of your colleagues, whom I've interviewed, have mentioned that they admired you in terms of your clarity of purpose and also very clear writing, and I wondered what were some of the differences in judgment styles and writings, and how those probably were resolved in finding a very narrow way of disseminating judgments?

LA Well, I accept the compliment with pleasure but with diffidence. I think we all have our styles and I was actually more than a little impressed, by how quickly people, who had no previous judicial experience and not a great deal of experience in the courts as such, how soon they adopted what in my view seemed to be an appropriate judgment writing style. There were some who could get quite heated if they were in a minority judgment in their style of writing, others could be expansive. Some could be even poetic. And certainly there was no pressure brought to bear on anybody to alter a particular style. I mean, there were always substantive agreements where you said, no you can't put this in a judgment or it's not relevant, or things of that nature, but not as to one's approach to the format and style of a judgment. And I think judicial style has developed itself, the most appropriate way of setting out the facts and the problem and the history of the case, which makes it easier for the judge writing it, so it makes sense to follow styles that have been invoked for good reason.

Int Another difference, as I understand it is, the introduction of law clerks to work with judges, and I wondered what your memories were of the law clerks that you worked with?

LA Well, I think that's probably one of the most unique and the warmest memories that I have; and I'm sure this is the case with all, and if not all, practically every judge. I suppose we all worked with our clerks differently but for me it was not only a great boon to work with young irreverent and critical minds, but to work with people who'd been in touch with and had been taught the latest law by teachers. Whereas we had not. I had a regular routine. At

eight or eight thirty, every morning, I would meet my researchers over tea, first a single researcher and then more than one, to reflect on the previous day, on the tasks at hand. I'd like to think that there was always a very easy flow of communication. I took a very particular interest in German comparative law and I was very fortunate to have a number of, I suppose, one would call them interns. Clerks not paid by the Constitutional Court but coming from Germany where certain of the states permitted them to work at the court and have the period that they worked here credited to their practical training. And that was of enormous help. They learnt a great deal, and I think all the researchers that had contact with them, learnt a great deal. Certainly the judges did, or at least I did. And it was a very rich experience.

Int Speaking of Germany, Laurie, as I understand it, quite early on, all the judges went on a trip to Germany, and I wondered whether you could talk about your memories of that experience?

LA Well, it was an enormous gesture by the German Constitutional Court in Karlsruhe to invite us all, to what was really a series of seminars, stretching over two or three full days. On discrete, important general constitutional law topics that were presented by the judges of the German Constitutional Court in English, for our benefit. It made me feel very good. I think it was enjoyed by all the judges who took part, and one realised what an important group of final courts one was joining.

Int I also wondered, in terms of actual institution building, you were really in the forefront of developing the library into a world-class resource and I wondered whether you could talk a bit about the starting point of that and some of the difficulties as well as some of the rewards on working on that?

LA To start with, I think our budget from the state was initially wholly inadequate, but was steadily increased throughout the years. I don't know what it is at the moment in rand terms, but it's more…I must be very careful in how I put it…it is a very fine budget which meets the major needs of the Court. Obviously if one is going to adopt a comparative approach to constitutional law, this has great implications for the building up of the library as a research facility. And there are book lovers and book collectors who collect not just for the love of it, but because they have the feeling that if a book is referred to fruitfully once in its lifetime in a library, its purchase is justified. So it's very difficult to know where to draw the line, but it has become, I believe, a centre of research for a number of institutions. And I think the holdings, particularly the German holdings, are magnificent. One of my previous German clerks who has a good knowledge of our Constitutional Court library, said that it was really good enough for a German student to write his or her first German doctorate, which I took to be a great compliment. One must of course remember that the Constitutional Court Trust itself, where Justice (Kate) O'Regan throughout played, and I think still continues to play a very important role, was important

particularly in the early years, to get the massive backlog of books purchased. And the policy was that only a foreign company's foundations and NGOs (non-government organisation) would be solicited for contributions in order to protect the complete independence of the Court. But that played a major role in filling in the vast backlog of materials that one needed. I mean, keeping up a library and subscriptions is expensive enough, but in one fell swoop to have to buy a hundred and fifty past copies of a particular journal or series of law reports, is a very expensive enterprise and the library continues to do extremely well.

Int You had mentioned to me that you retired in 2004, early 2004, and this was just before the move to this building. I wondered in terms of your involvement in working on this building, if you could talk a bit about that?

LA Well, it was quite an adventure. I had previously been involved in building my own domestic residence, but this was quite different. And a great deal of technical planning had to go into it. I haven't seen how it works in practice, so I suppose it's best to hear from the judges who've had experience of it. But I think it's been an enormous success aesthetically and I think practically it also works very well. The main Court chamber, in particular, is very South African in the broadest and best sense of the word. We're all incredibly proud of the library and we suddenly realised at a stage when they were already throwing the foundations, that our original estimate of having a library that would not exceed, say, a hundred thousand or a hundred and twenty thousand volumes, was wholly inadequate if one really was going to have a world class library. And thanks to the intervention at a very late stage by Justice Langa, who was then Deputy Chief Justice, with the Department of Justice, we managed somehow, to get a very substantial increase of funds for the building, which enabled us to plan and build the north and easy wings of the library. So that was due to a most fortuitous intervention by Justice (Pius) Langa. Alot of it is still empty, and can be used in the meantime for offices. The library of t the Max Planck Institute in Heidelberg, which is the biggest and the best comparative constitutional law library in the world, I think holds something like five, six hundred thousand volumes. So I think ultimately our library will have to cater for, let us say, at least two or three hundred thousand, which it is capable of doing.

Int Laurie, in terms of some of the cases and the judgments you wrote, I wondered whether there were any in particular that stood out for you in terms of the issues that arose and that you'd like to discuss?

LA From very early on I was intuitively more fascinated by the Bill of Rights and the various rights involved in it than the structures of government. This is probably just a subjective temperamental sort of thing, so I particularly enjoyed all those cases, where the issues of dignity, freedom and equality arose. And I think the judgments that I enjoyed writing most and that I feel

happiest about, are the judgements that I wrote on equality, dignity and freedom.

Int And the Court is known for its very strong stance on socio-economic rights and I wondered whether that was something that had been debated; the use of the word of the word reasonable, for example…

LA Well, of course, the Constitution takes a very strong stand on socio-economic rights, so that when I agree with you that the Court takes a strong stand, it's not just that the Court subjectively takes a strong stand but I think it reflects what the Constitution demands. And it's a very tricky area, where I think the way forward, one will see a development of more and more nuanced remedies, where one tries, as best one can, not to be confrontational with the executive on a particular issue, but to enter into a dialogue, if you wish to call it, a directive or a structured dialogue, and quite a lot of work academically has been done on the importance of having appropriate, nuanced, step by step, incremental remedies. So I think that's where the future lies. Because most of the socio-economic rights are qualified in the sense that their enforcement is limited by the resources of government. Now, no Court, in my view, has any right to draw a new budget for a government. But if no provision were to be made at all for socio-economic rights, not even minimal attention, well then, its another matter. But it's to negotiate those issues and that's why I say I think that the judgments that courts give and the orders that they issue and the remedies that they grant have to be very carefully tailored in an incremental manner, to engender a dialogue with the other arms of the state rather than a confrontation.

Int In terms of the power that you've held as a judge, and a Constitutional Court judge, how do you negotiate that power in relation to the power of the executive?

LA I suppose each judge will give you a different answer, but to me it was fidelity to the Constitution. One has to construe it as objectively as one can. I never wanted to intrude my own unfounded, subjective view into the Constitution and I suspect most judges agree. But the difficulty comes when you have concepts such as dignity, freedom and equality, which are either wholly undefined in the Constitution or defined in a very limited sort of manner, to take dignity for example. Everybody has human dignity and the right to have their dignity respected and protected. It doesn't tell you a great deal about dignity. So legal philosophy does enter the picture and this is where one's, I suppose, one's own preferences play a role. One tries to be as rational as possible. And one is certainly always very fully aware of the tremendous responsibility of the task involving the interpretation and application of a Constitution like ours.

Int I also wondered, in terms of the politics of the country, do you think…especially at the time that you were on the Bench at the Constitutional Court, did that in any way ever impact on the decision making within the court?

LA Well, I don't think we ever deliberately thought or tried to think as politicians. It was not our proper role under the Constitution. Something that was noteworthy and that made, I think, a tremendous contribution to our constitutional democracy in the fairly early years of the court, was when the court had to give a judgment. It always considered itself bound under the Constitution to interpret the Constitution and a statute in a certain objective way. This it did when it came to the conclusion that the State President, President (Nelson) Mandela, didn't have the power to issue a regulation or to alter a statute, and that was the order given by the court. The day the order was granted, that evening, President (Nelson) Mandela was on the radio saying that he acted in good faith at all times, and had taken legal advice, but the Constitutional Court had spoken and when it came to the interpretation and application of the Constitution, their word must count. And I think that made an enormous contribution to the credibility of the Court. You probably heard it from other judges that you've interviewed, or people that you've interviewed, but certainly in my mind that was a watermark…watershed sort of event, which did a great deal for the status of the court.

Int And do you think since your retirement, as an observer of the Court, do you think that level of respect has been given to the court for the period 2004 to 2009?

LA 2004 to 2009? I don't think so. I don't want to get involved in the current polemic…but I think it's due in part I think, to the awareness of how very difficult it is for the executive, for financial, structural and other reasons to fulfil the socio-economic mandate.

Int I also wondered, Laurie…that speaks to a larger issue of the independence of the judiciary, which is at the moment a current topic, but I wondered when you were at the Constitutional Court, whether that was an issue and a concern, the independence of the court?

LA Well, of course, when we started, this was part of what I'd call a substantive legal revolution. It wasn't in Kelsen's terms a formal one because there was no revolution, which made a total break with the structure. We had the apartheid Parliament, which passed the Interim Constitution, set up the negotiating structures, which negotiated and formulated the final Constitution. So while there was very peaceful and a legal handover of power substantively, the whole structure of the state and state organs were turned upside down. And particularly the judiciary for the first time in its history, could

now question the validity of the law passed by a supreme legislature. And I think it was a concern for us, how would the government in general, given that background, even if it was an apartheid background, it had been the history for a long time, how would it play out? And I think it played out well, certainly for my period on the court, in favour of the independence of and the respect for the independence of the Constitutional Court. There's been a debate recently that the courts can't interfere with government policy. Now policy is a very broad term. If by policy one reaches over into the implementation, or the non-implementation of socio-economic rights, it may be policy but it's also part of the Constitution. The moment something is part of the Constitution, the Court must, by virtue of the Constitution, become involved when it is called upon to become involved. So I think there's a misperception of the role that the Court is playing, it's not laying down policy, its interpreting and applying the Constitution.

Int My sense is that the Constitutional Court judges haven't fully retired in the normal sense of the word, I wondered what you'd gone on to do?

LA Well, the big thing that I was involved with for about four or five years, was the South African Institute for Advanced Constitutional Human Rights and Public Law, SAIFAC. Which people say is a dreadful acronym but nobody's come up with a better one since 2004. And I was chairman of the board, and it was trying to set up for South Africa a world class research institute, housed on Constitution Hill, which is still going well despite the fact that foreign funding has dried up to a considerable extent. And I was involved with that at a fairly intense level for the first four/five years and I then withdrew from it. I had a bit of a dip in my health and felt I couldn't continue in a manner appropriate to what it required. That was what I did for the first, four or five years. And the other thing that I did was I started in 2005 to write a book, which bears the title, Human Dignity: Lodestar for Equality in South Africa. Which looks at dignity in the horizontal application of the Bill of Rights and trying to tease out what we mean by dignity and what we mean by equality. Also restitutional equality in terms of section 9(2) of the Constitution. And I hope to be handing over my manuscript to the publishers before the end of the year.

Int Congratulations!

LA It's been a torturous process and it's far more difficult, I found, trying to write a book, then writing a judgment. Why? I'm not sure. I think with a judgment one works from the outside inwards, honing down to the solution, and when you write your mind is supposed to expand outwards. Maybe I'm not…I just found it very difficult. Not that judging was easy but it was easier than writing a book. So that's how I've been occupied.

Int Right. I also know that you were involved with evaluation of the Legal Resources Centre through the Elma Foundation, and I wondered whether you could talk a bit about that process?

LA I can't say a great deal about it, it was very interesting, simply, and this is the fascinating part of it, one had known what one thought was a great deal about the Legal Resources Centre but this really gave one an insider's opportunity really to plumb all the depth of its work and enterprise, and in hindsight to reflect on the enormously important contribution it has made and is making. And as an important aspect of civil society it just impressed on me again how important the support of civil society is for the successful working of what is a very imaginative Constitution. And it increased my very great respect for both the pioneers and, if one wishes to call it, the people at the pit-face.

Int Laurie…when I spoke to other colleagues of yours from the first Bench, they remarked on the sadness with which they faced their final year on the Bench. Your time came to an end more quickly because you'd served previously, but I wondered how you negotiated that final year at the Constitutional Court?

LA Well I think we were very busy, and hard work is a palliative for many negative emotions. I think the most…I don't miss so much not being a judge, an active judge, but what I do miss enormously is the intellectual stimulus and interchange that I had enjoyed with all my colleagues on the Court. I mean, that had been a feature of both one's emotional and intellectual life, which is really very hard to describe properly. You're thrown together, you have to do it, but it's a very enormously big plus in the job. So it was difficult. In a certain sense I have felt intellectually lonely ever since leaving the Court, despite the fact that I keep contact with a number of its members. It's just not the same, nor can it be.

Int Laurie, I've asked you a range of questions, I wondered whether I've neglected to ask you something, which you really feel ought to be included in your oral history?

LA I don't think so, I've not been a guinea pig in an oral history project beforehand. I think you've honed in on collegiality, the challenges of judgment writing for eleven people, the difficulties but also the positive spinoff that that has. The Court is sitting in a fantastic building which I hope will for an unlimited number of years ahead still be a symbol for judicial independence under a constitutional democracy.

Int I have one final question, in terms of the transition to democracy and the role of the Constitutional Court, what were the challenges then, and what are the challenges that remain now?

LA Well a lot of the challenges then were associated with apartheid legislation, and a lot of criminal cases where there were reverse onus provisions regarding the presumption of certain facts, which could result in a situation where a Court, although it had a reasonable doubt of the guilt of the accused nevertheless had to convict the accused. So a lot of those cases, although intellectually challenging and intellectually controversial, were not politically controversial. I think the litigation, if one takes the last year or so, I think has changed, and particularly the number of cases where the Court has been directly or indirectly associated in conduct of leading figures in the judiciary, in the administration, in the executive, is I think where, you know, where the most powerful stresses in the bridge will be encountered. I don't know how much of that is just fortuitous because of facts particular to South Africa, but at the moment this is what I see, and it may be more of the socio-economic type of disputes, which come to Court. Because the fact of the matter is that the disparity economically in all its manifestations is still horribly vast in South Africa, and this is one way or another going to play itself out politically. How much the Court is going to be directly involved, I don't know, but I would suspect that in some way or another people would at least try and involve the Court in the on-going economic transformation, and that's going to be very difficult I think.

Int In terms of your memoirs, I wondered where you would position your role as a Constitutional Court judge, given your vast enormous experience on the bench previously?

LA Well I just don't think that there's anything that can compare with the, let's call it, the honour and the opportunity of serving for ten years on the first South African Constitutional Court. There's no other way of putting it.

Int Laurie, thank you so much for a great interview.

LA My pleasure.

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