

**Ursula Bentele    Constitutional Court Oral History Project**

**14<sup>th</sup> March 2013**

Int     This is an interview with Professor Ursula Bentele and it's the 14<sup>th</sup> of March 2013. Professor Bentele, Ursula, thank you so much for agreeing to participate in the Constitutional Oral History Project, we really appreciate it.

UB     It is my great pleasure.

Int     I wondered if we could start if you could talk about early childhood memories, where you were born, a bit about family background and some of the formative influences in terms of you taking a particular legal and academic trajectory?

UB     Okay (*laughs*), it goes back a ways, I'm going to be seventy soon, so...I was born in Germany in 1943, so in the middle of the war, so my earliest memories actually are of bombing. We had to move eleven times during the war and it was obviously traumatic for my parents mainly, and children were a little protected from the worst of it. But certainly my growing up in Germany...I left there when I was thirteen, although there was a four year period when we moved to England, so that I learned English when I was between, I think, five and nine, and spent time in England, so that interrupted my time in Germany. But the experience of spending my childhood in Germany where, you know, after the war where in schools we really were not told much about, if anything, about what had happened during the war and pre-war. And when I came to the United States, as I say I was thirteen, I was in eighth grade and it was really then that I learned the horror that led up to World War Two. And I think that has had an influence on me, no question. I didn't go back to Germany until I was in college; I went with my roommate. And frankly didn't much like what I saw. I thought it had sort of adopted the worst of American materialism and hadn't really reckoned with its past in a thorough way. I think that's probably not as true as I perhaps thought it was. I went back more recently, actually, after the South Africa trip, my most recent trip to South Africa, and got a sort of a better sense, but that's sort of a long version of the early childhood. In terms of the law, when we came to the United States, one of the ways that we...particularly my mother who did not really speak English well at all...tried to learn English, is watching a lot of television. And the show that I really got totally hooked by was the *Perry Mason* show. And then and there, at age thirteen, I still have an essay that I wrote at that time; I decided to be a criminal defence lawyer. I decided that when the State is arrayed against a person who might be falsely accused, maybe not, but the assumption has to be that the person is innocent, and I would be the lone person standing between that person and prison or possibly even execution. I wasn't thinking that at the time, but I did decide that criminal defence was really something that I very much would like to get into. So I went to college and I had a very

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good professor in college who I think was on the Board of the University of Chicago and encouraged me to go to that law school. So I went to law school with just the sole intention of going into criminal defence, so that most of law school was pretty irrelevant to me. And I was very fortunate to get a job with the Legal Aid Society right out of law school, so I practised...

Int And this was in Chicago?

UB No, this was...I came here, I met my husband in Chicago and he's a New Yorker born and bred and would never move, so we moved here. And I got a job with the Legal Aid Society in New York City, and did in fact defend people at trials and then switched to appeals once I had children. As you know, that can change one's routine (*laughs*). So I did criminal defence work. And then when I had my second child and the work even in appeals got to be a little bit too much, and they wouldn't let me work part-time – one of the things that I think is better in South Africa is greater accommodation. It's better here now too but it wasn't then, so I applied for a teaching position here and that's how I got here. And here I started as a legal writing instructor but the then Dean, David Trager, encouraged us to develop other courses if we wanted to teach them, so I taught a course on the death penalty, and started handling cases with the students. And so the death penalty became a big part of my research focus as well as practice. And that's actually part of what got me to South Africa the first time when I had my first sabbatical in 1992. Hard to believe it's been twenty years, but it was an amazing time to be in South Africa, just when, obviously, things were changing greatly. So that's how I came to be in South Africa.

Int I'm going to ask you questions about your visit to South Africa, but before that, I was very curious, being born in Germany at such an important historic moment, and then the silence around what was going on, and then learning about it, at also a very formative time, I'm wondering how that may have influenced your sense of social justice? Because when I read your writings I almost feel like you're an activist lawyer...(*elicits laughter*).

UB I've been told that.

Int ...I wonder in terms of social justice where that comes about?

UB Ja, you know, I'm not a psychologist or psychiatrist but I think you're probably right that the experience that I had as a child and an adolescent really formed a very deep conviction in me that I must do what's right, I can't let wrongs happen without doing whatever I can. And one of the things about South Africa is I don't know if I would have had the courage that people had during the apartheid era. I see Albie Sachs and I'd like to think I would, but I certainly greatly admire those people. I think it's probably a bit of a flaw in terms of

academia. I was certainly told that my writing was too much of a, you know, all this proselytising, that I had too much of a point of view, I wasn't objective enough and theoretical enough, but that's just the way I was...

Int I meant that on the contrary.

UB (*laughs*) I appreciate that, but I certainly try to be as objective as I can in defending what clearly are positions that I definitely hold. And, no, not everybody would agree but I think that's...you're right, that's partly of my personality. My students, some of them go off to become prosecutors and they sort of feel sheepish asking me, is it okay if I'm a prosecutor? Absolutely fine, it's your personality...I could never, I could never put somebody in jail, I just couldn't. I had an opportunity to be a judge at one point, and I said, it's just not me. I think prosecutors and judges who do their jobs well can do probably more good than defence lawyers. But you have to be true to what you yourself find enriching and what makes you happy.

Int I'm curious, coming back to when you decided to get interested in the death penalty; in terms of your sabbatical, why did you take it to South Africa?

UB Well, two reasons: one, frankly the political situation in South Africa just acted sort of as a magnet, even though back then there was still some controversy about whether one should go to South Africa. But I thought at that point the tide had turned enough so that it was just going to be fascinating to see the changes. And so I really went just to be able to witness that, and I was fortunate to be able to...I certainly didn't play any kind of a role, but I was an observer at some of the committee meetings and the CODESA sub-meetings that were discussing the...proposing the Constitution and I just knew that would be very exciting. In terms of the death penalty, I did do a little research beforehand and really discovered amazing parallels between the United States and South Africa in terms of use of the death penalty. From originally in both countries you had mandatory death penalties and then switched to discretionary. With definite concerns about discretion being abused and possibly in South Africa unlike here I think, being abused for political reasons...I frankly don't think that that was so much a case here. In addition the race factor, with white victims for a black defendant, much more likely to get the death penalty. It's still true in this country and it certainly seemed to be true there, so that there seemed to be a lot of parallels and I wanted to find out more, so that served as sort of a more objective excuse in terms of my academic research than, gee, I want to be part of this great change in South Africa.

Int Prior to that, had you been to South Africa or had you met lawyers from South Africa, for example the Legal Resources Centre lawyers or any of the other...?

UB I had heard about...was aware certainly of the Legal Resources Centre. My husband worked for the Ford Foundation, and the Ford Foundation was obviously very much involved in the struggles. But I had not been there before; that was my first trip in 1992.

Int And your memories of that trip?

UB Well, it started off inauspiciously. I ended up getting a placement at the University of Cape Town, as sort of a researcher and I ended up teaching a couple of classes for Kate O'Regan. I met her first then. And Dirk van Zyl Smit was the Head of the Criminology Centre. So I had sort of a niche. I ended up going there, arriving on a Friday the day before the Monday classes were to start in the spring term in February. And I had rented a car and I was going to go to the beach because everybody was too busy preparing for classes, they didn't have time for me. Somebody had picked me up at the airport, very nice, and I made a right turn, got into a car accident immediately. The other car, thank god, neither of us was hurt, our cars were totally smashed, but he was a police officer and he was so nice. He was so nice and caring and oh dear...so that was a bad start. It does make me remember the trip. I immediately got another rental car, which I didn't dare drive for about two weeks, because it's amazing how habit, you know, no matter how your conscious mind tells you, you have to remember you're on the left side of the road, habit takes over, and so...but I did end up meeting a lot of people. I stayed most of the time in Cape Town. I had this wonderful apartment in Mowbray and usually walked to the university. And the library there was wonderful so I got to do a lot of research, and as I say, participated in a couple of classes. I ended up speaking about the death penalty to a Bar association group, to some students. I met William Kerfoot who was the head of some organisation against the death penalty that was trying to get the public, basically, to buy into abolition. So a lot of things in Cape Town. I went to Johannesburg. I frankly don't remember too much about what I did there. It was...I went back to Johannesburg the last time five years ago and found it much easier to get around. Back then it was nervous making...I didn't feel safe basically, and comfortable. So I didn't really...I did go up to Pretoria and ended up actually going with a lawyer to visit with a death row client, which was very interesting. And I spent a few days in Durban where I went to the KwaZulu-Natal University and had a lovely time. I mean, it was sort of amazing that...the change that had already taken place. So all in all it was hard. I was there, I had two children, they were at home, they both came to visit at different times but...my husband came to visit, my sister, but it was very simply long, ja, I think I was surprised that two and a half months is a long time to be away from your family. And getting to know people is...eventually I developed wonderful relationships but I think the same thing happens here when people come. Everybody is doing their own thing, and you know...

Int It takes time...

UB It takes time. Lee Anne de la Hunt, do you know her?

Int I've heard of her.

UB Oh, she's so wonderful, she was running the Legal Aid Clinic at UCT (University of Cape Town) and she became a great friend and very helpful.

Int At what point did you then...you sat in on the CODESA meetings and I was curious about that?

UB It was very informal and I think it wasn't Christina Murray, it was...I wonder if it was Kate (O'Regan)...or Hugh Corder, I think, may have been the one. Hugh Corder I think was the one who invited me to just sit in on a couple of the meetings. And, I mean, I was just so impressed at sort of the commitment and the sort of sense that they thought they could do it, and that they were part of this enterprise that really was going to change the country. And the lack of bitterness, even though many of their members had certainly suffered greatly. It was extremely impressive I thought. I also thought that, you know, the community of people is really relatively small, so everybody seemed to know each other. I couldn't believe that Hugh Corder, when I met him, and he was very young, and he had already written this book about the Appellate Division, and everybody just so very accomplished. It was very impressive.

Int At that point, had you met Arthur Chaskalson?

UB No, no. I don't believe I met him that first time. I met somebody else at the Legal Resources Centre but I didn't meet him.

Int After your trip, did you then start paying closer attention to South Africa? I'm curious how your interest in South Africa has evolved since then.

UB Oh, I definitely did. Well, I wrote...I didn't give you that article, I wrote an article about race and the death penalty in the US (United States) and South Africa. And, you know, did very much follow along. And I went back actually in 1995 for the first Constitutional Court argument, and was very lucky to be present at the swearing in by Nelson Mandela of the Court. So impressive, so amazing. And then the two and a half days of arguments on the death penalty, which I actually happened to sit next to Nadine Gordimer during the arguments. She was amazing. And I was permitted to tape record them, so I had the recording of the arguments and just found it so impressive. Seeing that Court, you know...I mean the United States Supreme Court is an

impressive institution, but it's so different, it's so different. And I think people here sort of assume that any country that's setting up a new Constitutional Court will of course want to emulate us. Well, not really, I mean, South Africa took more from Canada and from Germany, from some of these other Constitutional Courts and Constitutions, the way of setting up the rights, and I just think that they took the best really from all over, which I think some of the characteristics...I mean, you didn't ask me about this, but is it alright if I...?

Int No, please go ahead, if you're pre-empting...it's absolutely fine.

UB You know, I think eleven judges is probably better than nine. I think Kate O'Regan said at one point, that's partly why it takes the Court so long to deliberate and to come to its decisions. But I think it's good. Particularly when it's combined with the sabbaticals and the acting justices and the law clerks. I just think it's...our court is so sort of divided now and you get so many five/four decisions that you can predict, you know, from the get-go, which way it's going to go, and that's just not possible there. There are just too many people coming in and going out, and you know, in addition to it being a very diverse Court to begin with in terms of the backgrounds of the justices and the career path as well as upbringing and so on. But I just think that it's a better model. I do worry about where it's going but certainly for the years that I've been, and I frankly have not paid as much attention to it since I wrote this article about foreign law, but certainly in that period, in the first thirteen, fourteen years of its existence I thought it was just an exemplary Court.

Int In one of the articles you gave me, you spoke about how the South Africa Constitutional Court approached the *Makwanyane* (*S v Makwanyane and Another*) case, the death penalty case, how that could be used as an exemplar, and I wondered whether you could talk about that particular case and how it's important in terms of international global understanding of the death penalty?

UB Yes, it is. Obviously the South African...I teach it in my death penalty course, I actually teach the *Makwanyane* (*S v Makwanyane and Another*) opinions along with the opinions in the *Gregg* (*Gregg v Georgia*) case in the United States where the court (United States Supreme Court) upheld the death penalty. And the contrast is just pretty stark. In terms of the South African Court, I just thought both that the argument and in the ultimate judgments by each of the justices, such thoughtful approach to the issue considering really everything and not going into it with a predisposition but looking at everywhere where the death penalty has been applied, including South Africa, including in the US, in India, some countries that have systems, democratic systems that are much like the ones here. But the problems with it and seeing the problems with applying it, quoting Justice Blackmun when he ultimately decided it just couldn't be done. And paying really close attention, which our court has not done, except for a couple of justices, to the pain associated with waiting on

death row. The so-called death row phenomenon, which I really find very disturbing, and from the point of view of human dignity and just, you know, our justices who talk about, you know, well, when the Bill of Rights was enacted there clearly was a death penalty, it was mandatory, so how can we possibly say it's bad. But back then a delay of four weeks between sentence and execution was considered to be long and it was considered to be problematic. And somehow we lost sight of that. Just imagining, I mean, I just can't imagine it, and somebody was executed the other day who couldn't imagine it, who gave up all his appeals and said, you know, I can't handle this and the amount of mental illness. I mean, a lot of people have mental deficiencies, which is possibly why they ended up on death row to begin with but it's certainly aggravated by not only being in prison but the prospect of any day somebody will come and say today it's your day, you're going to die. And the South African justices just seem to see that, they seem to see all aspects of the penalty. In addition to the arbitrariness and the discrimination and the, you know, how do you really figure out a system whereby...you're not going to execute every murderer. In this country there are fifteen, twenty thousand murders every year. You're not going to do that. South Africa was not going to do that. So you have to select. How do you go about doing it in a way that's fair? They just seem to see all the difficulties. And I guess what I found most compelling, what really is at the heart of my opposition to the death penalty, is what it does to the people who do it, who kill. And, you know, we've certainly had instances of wardens who, this is not me, I don't want to do this anymore. And what this says about our society that we really can sort of simply put a human life to an end, I think it demeans us.

Int Do you think at the time when the *Makwanyane (S v Makwanyane)* case was being...in front of the Court, do you think that the actual judgments, even though there were eleven of them, they were separate judgments, they were unanimous in that sense; do you think they echoed the populous sentiments of what was going on in South Africa?

UB No (*laughs*). I think South Africa, like the US, the population...it depends on how you ask the question to some extent, but most people are in favour of the death penalty. If you ask them, do you believe in the death penalty? They will. Most people will say yes. And certainly part of the argument on the part of the government in South Africa was, you know, we have this huge crime rate, and all right Sweden and other countries in Europe they don't have the kinds of problems we have, they don't have to have the death penalty, but we need it. People believe that, people believe it. And I think that's another thing, where the Court I thought, was much more thoughtful than our court in terms of deterrence. I mean, I would have a much harder time opposing the death penalty if I thought it actually did deter, because then you start thinking, well, can I save an innocent person's life? I don't think it deters. I think there's never been any evidence that it deters and I think in South Africa the Court said, well, it's really up to the State to show that it deters. If it can't demonstrate that we're not going to assume that it does, and I think it was in



Justice (Arthur) Chaskalson's opinion where he said, you know, there are a lot of other things that South Africa can do to reduce the crime rate that are much more likely to be effective, like a better police force and better investigations. That's going to do much more than just having the death penalty. It's just not going to happen. But I think most people don't believe that. And here, in *Gregg (Gregg v Georgia)*, the court (United States Supreme Court) said...in not a very good analysis in my view...Justice Stewart, I think he said, well, deterrence, it's a very difficult issue and legislatures are in a better position, blah blah blah, but in some cases the death penalty surely serves as a deterrent. Where does he get that? No citation, no nothing. It's just sort of a statement. And in retribution I just don't see that as a valid basis for killing a human being. I just don't see it. I think Ubuntu is a much better approach. But I think even today probably if you put it to a vote in South Africa they would want it back. I would guess, don't you think so?

Int Indeed (*laughs*).

UB So the Constitutional Court was courageous in that way. The drafters of the Constitution decided they weren't going to decide this issue, they left it to the Court, but I think the Constitution in the cruel and unusual treatment clause and in the dignity, I think it gave a pretty...and in it saying that you can only interfere with the right to life if you have...if you really have a basis for it. And they just couldn't come up with a basis.

Int I'm curious, the *Makwanyane (S v Makwanyane)* case is not the first published case...

UB No.

Int But the choice of the *Makwanyane (S v Makwanyane)* case almost right at the beginning, what did you think of that, given your interest in it?

UB Ja, well I was happy to see it because I certainly thought that it would come out the way it did. You know, it was a courageous decision I thought. But it was also in some ways pragmatic because there were these people on death row, something had to happen with them, and I don't know what went on behind the scenes at all but I wouldn't be surprised that the Court, given that South Africa had no tradition of judicial review at all, that it wanted to have a case where it made a difference, and so that people would start getting used to the idea; this Court has the power to declare statutes unconstitutional, and even statutes that have popular support. And I don't know, I'm really just speculating.

Int Your research on the use of Constitutional Comparative Law by South African judges is really interesting of the justices, I wondered if you could talk about the genesis of that project, your impressions when you visited the new Court in 2004, and also meeting the eight justices whom you interviewed?

UB The genesis really came from here. There was a great to-do largely by Justice (Antonin) Scalia and (Clarence) Thomas, objecting to our court's (United States Supreme Court) reference to foreign law. In part regarding the death penalty and even now traditionally until 1989 the court had often looked abroad to see whether other countries, even in the *Coker (Coker v Georgia)*, the rape (case), the decision declaring unconstitutional the death penalty for rape, the court said, you know, very few countries do this anymore. And then all of a sudden in 1989 in Stanford regarding the juveniles where the court first decided that you could be executed even for a crime that was committed when you were sixteen to eighteen years old. Then Justice (Antonin) Scalia wrote for the court that because the people arguing on behalf of Stanford said, there are very few countries who execute people who are under eighteen. And Scalia said, it's the American Constitution, it's the American...it's what happens here that matters. What other countries do is nothing to us. And you know, he does...I think he has a bit of a point by saying, you know, we have free speech and we have other kinds of rights that we don't necessarily want to look at others, but he criticises people for cherry-picking and selecting when they'll look abroad and so on. But...so he, for the court said, we should not look at foreign law even though the court had been doing that for years, not only in the death penalty area, in a lot of different areas. And when other people started picking it up and Ruth Bader Ginsberg gave a talk, and Justice Breyer, they both justified the use of foreign authorities, and obviously not as precedent and not as binding in any way but as helpful, as useful. And so there was just this debate going on in the court. And I thought, well, you know, I happen to know of a Court that uses foreign law a lot and the folks who oppose it make these criticisms and let's just see if those criticisms really are valid in a Court that actually does engage in this practice. So it was really meant as sort of an empirical project and Kate O'Regan was wonderful and arranging for me to be able to see many of the justices, former and current, and everyone of them was happy to talk to me and allowed themselves to be taped without a problem. And basically just expressed puzzlement, you know, why wouldn't we? Why wouldn't we look when other serious judges around the world have been confronted with similar problems, why wouldn't we see how they decided them? And really were just sort of amazed that there could be any problem with that. But when I pointed out the various criticisms like the possibility that you misinterpret what the other jurisdiction is doing, particularly when there's a translation, when there's a language problem. But even when you have English speaking, Australia and England and Canada, there are different cultures, there are different sort of premises that the Court uses, unspoken often, and will we necessarily understand those when we import their conclusions to our setting. So that's one, you know, misapplication in a way. Another cherry-picking, which they all said, you know, ja, but we cherry-

pick domestic sources too (*laughs*). You know, if you're trying to justify a position you find what's supportive of your position and you don't distort it and you don't ignore things that go against you, but, you know, what you find to be useful you can use. The first criticism none of them thought had any validity, that somehow it undermines your own sovereignty and it's going to somehow undo the integrity of your Court. And they said, of course, you know, it's all just persuasive, we're not just automatically agreeing with somebody just because they come out a certain way. In fact, as I point out in the article, a lot of the time they're citing to dissents, particularly from the US Supreme Court, and they just find persuasive what judges say in analysing these issues. And I think Kate O'Regan in particular was very thoughtful about how, you know, there are different points of view, and all court cases have at least two. And most of the time there's something to be said on each side. And you want to know everything that...you want the best available information, and then you decide, you make your own conclusion. And sometimes the Court very self-consciously says, you know, that may be right for India, or that may be right for that jurisdiction, but it's not right for us.

Int So it's context.

UB It's context, absolutely.

Int Is there a particular case which used foreign law in South Africa that you were very interested and struck by?

UB Hmm. Now I have to cheat and look back at it (*laughter*). Actually the one I was just describing with Kate O'Regan with...which isn't actually my particular area but of whether the police should be held liable...

Int Yes, the *Minister vs (K v Minister of Safety and Security)*

UB Ja. I thought that was extremely interesting, and she did look. She looked at English sources, and American sources, and there were conflicting results in all those cases. But she looked very carefully at the facts, and as you say, at the context in which those judges came to their conclusions, and it helped her to arrive at the conclusion that in that particular case that the police should be held liable. Even though that is not necessarily the popular or the thing that...certainly it's not something that the government would appreciate. And she understood the problems with it but she did seem to value the thought that had gone into it in these other contexts and then was able to draw principles from those contexts that helped her decide how to come out in that case.

Int Also what was interesting in your article was that the American counterparts expressed concern about precedent, and in South Africa methodologically the justices didn't think that that was an issue. I wondered whether you could talk about how they approached it?

UB Nobody in South...none of these justices that I spoke to in South Africa would ever say I'm using a US case or an Indian case as precedent. I mean, they just thought that was totally far-fetched and ludicrous. Of course it's not, it's a different jurisdiction, it has no power to bind me at all. And it's...and I don't think American judges, the few who do now...well, it's not really that few...Justice (Anthony) Kennedy in the...finally in the case where we did decide that juveniles should not be executed, did refer to the fact that we're basically alone in the world. But it's not that because everybody else does it we have to do it. It's not a matter of precedent, it's a matter of...well, I think in the cruel and unusual punishment, regarding that issue I think there's also a question of, given that cruel and unusual punishment is sort of a measure of humanity, that why should it be specific to a particular country? But even outside of that context you're not really looking for the substance, you're not really looking for why you have to do it a certain way, or why the consensus is a certain way. I mean, that's customary international law. That's a very different matter I think. This is, we're interpreting our own Constitution and we're trying to figure out the best way to apply it to a particular factual context. Another country has a similar provision, has faced these problems before, and why shouldn't we look to see how they did it? It's not in terms of precedent at all. It's really in terms of the reasoning, in terms of what kinds of policy considerations they take into account in terms of what are the consequences of doing it one way rather than the other, and you know, particularly with a Court that's so young.

Int Also I thought was rather interesting in your article, you emphasised that, even though the situations are different, the arguments are different, at the end of the day the justices in South Africa were really looking at the reasoning...

UB Yes, definitely. That's all they were looking at. They were looking at the reasoning and the policy implications. And just thinking about what kinds of considerations you should take into account when looking at these problems. Because, you know, just like eleven heads are better than one for a court, the more information you can get from others who have really spent time thinking, and seriously thinking and honestly confronting these issues, why not take advantage of that rather than reinventing the wheel.

Int There's a criticism that the Constitutional Court in South Africa hasn't really made much inroads in utilising foreign law from other African countries, from the continent, what's your sense of this?

UB Well, I mean, in the death penalty (*S v Makwanyane*) area they did look at Zimbabwe and some of the other countries. You know part of, I think, the problem, and I did do a little bit of work on that as well, is it's very hard to get research done in some of these African countries. They just aren't up to speed in terms of being able to access the judgments easily. So I think that might be part of that. Ja, so I don't know.

Int I wanted to bring you to the present. You interviewed members of the first Bench and subsequently do you get a sense that there's this continued strong tradition of using comparative law in the Court?

UB Well, I did note that it's gone down a little bit, even in the period that I studied. I have not looked to see whether it's gone down any more. So I don't know the answer to that. I would be very surprised if it had stopped altogether and I'd be very surprised also if it dramatically decreased. I would think that they would keep doing it. But I think it depends to some extent on the issues before the Court. I mean, there are certain kinds of issues where it doesn't make much sense to look abroad. Whereas the issues that the Court was confronting in its first ten, fifteen years, were issues that have been dealt with in other places. So I think some of the stuff that's really very local in terms of the local government and how it has to be structured and what it has to pay attention to, those kinds of judgments, there's probably not going to be much to be learned, because it is so indigenous and it really depends on exactly how South Africa decided to structure its local government, for example.

Int I'm also wondering, a bit more broadly, there's a concern that the Court hasn't addressed socio-economic rights sufficiently, and I'm wondering from your perspective, what you think of some of the cases that have come before it and how judgments have been meted out?

UB Ja, I know there's been a lot of criticism of that. It's not my area, I do primarily focus on the criminal law and criminal procedure area, but the *Grootboom* (*Government of the Republic of South Africa and Others v Grootboom and Others*) and some of the other cases I am aware of and I'm aware of the criticism. I think I'm sort of a defender of the Court in not going faster in those areas just because...well, two things. One is, it's a Court, it doesn't have money, it can't implement a lot of the rights that the Constitution sets forth in a very admirable way, but it's...it doesn't have the resources. It can't say, bingo, ten million houses shall be built tomorrow. It can't, it's limited in what it can say and it seems to me it did a pretty good job of nudging the government and saying, you know, this is not enough, you haven't done enough here, you have to do more. But I think at a certain point it probably would be counter-productive for it to go much faster. And I know colleagues of mine and certainly people in South Africa would disagree with that and think definitely

the Court could have done more. But I just see the problems with enforcing those kinds of rights. The other problem I guess I sort of see is one that...I read Kate O'Regan's *Helen Suzman Lecture* and...you're familiar with that?

Int Yes.

UB And I do think there's a danger where she worries about the President who has the right to appoint the justices and the President sort of undermining the authority of the Court by saying, look, you're treading on our turf. Parliament and the executive are really supposed to do these policy things and do these things and when you counter that, when you interfere with that, you are basically interfering with the democratic will. And obviously that's what judicial review is but I do think one has to be careful with how one exercises it. Because that would only...I think that would only encourage that kind of thinking and ultimately I think that would be a bad thing.

Int It's interesting because the Court in some ways has taken enormous risks in terms of the issue of liability against the State, so it hasn't backed down in that respect where other courts may have. I'm wondering, for example, the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case, there's considerable argument that the Court came too close stepping on the executive in some ways, what's your sense of the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case?

UB That one, I don't know, there was so much at stake there. And maybe it came close but I don't think it overstepped its bounds. It's going to be hard for you to get me to criticise the Court (*laughs*).

Int (*laughs*) Fair enough.

UB I'm just a big fan. I really don't...I mean, you know, I can disagree with some of the decisions but I just think that the justices were very cognisant of the line that they were walking and the pitfalls in both directions. And you know, if on occasion they got it slightly wrong, so be it. I think for the most part I think they did an amazing job under very, very difficult circumstances. Because there was no guarantee that...I mean, one of the first judgments was saying to Nelson Mandela, no, you can't do that, right? And there was no guarantee that the whole thing wouldn't fall apart. And you know, it hasn't. And I don't know what the South African population really thinks about the Court but my sense from a great distance and really not knowing enough is that it has established a reputation as being a good institution. I will tell you one other...it was just one of my favourite stories, when I first went back to the new building.

Int That's 2004?

UB The new building opened in 2004, I wasn't there until 2007, when I did the interviews with the justices. And, so I was at the Court quite a bit conducting the interviews and in between I would go sit in the courtroom. And one of the cases I saw was ((*MEC for Education: Kwazulu-Natal and Others v Pillay*) (Navi) Pillay, I think was her name...was a woman whose daughter (Sunali Pillay) wanted to wear a nose ring, and had been told no jewellery in this school. And two days of arguments, I mean, very thoughtful. And I happened to, when I was leaving the Court, she and her daughter happened to be standing outside waiting for a taxi, so I talked to them. And she said, you know, she started the case pro se, without a lawyer, and went to some kind of an administrative tribunal that she had to go to first, and they rejected her claim, they said no accommodation. And then she did hire a lawyer and went to a court that also rejected her claim. And then I think it went to an Appellate Court and she won. But throughout that experience she said, you know, I just didn't feel like I was being really heard. I was like a football that was being thrown around. And she said the experience today in the Constitutional Court just made it all worthwhile. She didn't know how the case was going to come out but she said they treated us like people. They took our case seriously, and, I mean, it was very moving, she really...you know, she's one person and her daughter, but she clearly thought...and I think she was also, as was I, just impressed with the setting and the majesty of the place and the light coming in.

Int That in a way makes an argument for direct access, which some NGOs in South Africa argue for and use other countries and contexts to explain why direct access is so important. What do you think of the South Africa Constitutional Court not having direct access?

UB Ja...that's a tough one, I think. And I would think ultimately maybe they would. I mean, I think the practicalities are tough to figure out how to monitor and how to control it, but I think they're pretty open to hearing cases brought by pro se even litigants.

Int When you interviewed the judges, I'm sure more broadly, I wondered whether you got a sense of some of the tensions and struggles that they grappled with in terms of principle and pragmatism and judicial adjudication?

UB Ja, I think they all...I mean, the one that comes most to mind is Albie Sachs in that regard because sometimes I think his principles definitely send him in one direction and then the practicalities sort of pull him back. But I think they all struggle with that. Very thoughtfully and very self-consciously they're aware of having to, in some ways, accommodate at times.

Int One of the criticisms is that the first Bench, even though they were diverse, and they came from different backgrounds, etc., politically they all had a very similar bent and there's this comparison with the Supreme Court in the United States with such divergent viewpoints. I wondered what your sense is of these two institutions and how they work?

UB Well, I mean, in a sense, obviously you're absolutely right but you know that certainly no pro-apartheid judge was going to be named to the Constitutional Court, so in one sense the politics were all in a certain direction, certainly on that very basic fundamental issue. But I think other than that I got a sense that the politics of that Court are really not all that uniform. There certainly seemed to me to be somewhat more conservative justices and more liberal justices. Not nearly as diametrically opposed as we have here, although here it seems to me we have sort of the opposite problem. We have nobody on the left at all (*laughs*). People who are considered liberal are what would have been centrist twenty years ago or thirty years ago. So I'm not sure it was quite as sort of homogeneous, although certainly more so than what we have. And, you know, I think probably as time goes on that will increase, there'll be more...because that was such a moment of totally establishing a new Court that it had to have a certain kind of cohesion.

Int I know you're a fan of the Court so I'll ask this question first. What makes you such a great fan of the Court? I know you've spoken about some of this and it's obvious but I'm curious to learn from you?

UB Just seems very thoughtful, deliberative, courageous, principled, without being ideological; does that make sense?

Int Sure.

UB Very collaborative, I mean, it just seems as though they really respect each other's opinions and I think...I got the impression from this book of Albie's (Sachs') (reference to *The Strange Alchemy of Life and Law*) actually, that they do persuade each other to change their minds on occasion, which I'm not sure how much that happened. And it does happen here, it does happen here. But...and, I mean, courage is one of the big things because I don't think it's easy to be in the position that they're in. The country has got a lot of problems and sometimes people are going to see them as getting in the way of solutions. But...I love the way they write their judgments, I love the paragraphs, that's a small thing but I do think it's great. And they're very transparent, very...I like the fact that they take clerks from all over. And they just seem very receptive, even though access to the Court is not direct but they do seem very much aware of what the effect of their judgments will be on the people whose feet they see outside the courtroom. And very concerned



with dignity and equality, obviously, which are values that I think sometimes we lose sight of.

Int What are your concerns for the future of the Court in South Africa?

UB Well, I mean, I haven't, as I say, kept in as close touch recently but President (Jacob) Zuma's statements about the Court did not seem helpful. You know, very critical and seeming to think that this was a power struggle. Whereas it's supposed to be three branches of government, each of which has a role. That bothered me. There was criticism about the new President, the new Chief Justice. I don't know enough about that to be able to say whether that criticism was valid or not. There were certainly some disturbing quotes that were bandied about from him that were troublesome. By contrast, Justice (Dikgang) Moseneke, the Deputy President, whom I had interviewed, conveyed a deep and thorough understanding of the important role played by the Court in the new South African democracy. I just hope President (Jacob) Zuma and whoever succeeds him understands the great value and the great benefit from having this Court in the country, and I'm a little concerned that that may not continue.

Int Ursula, I've asked you a range of questions, I'm wondering whether there's something I've neglected to ask, which you'd like included in your oral history?

UB You've been very thorough (*laughs*). I wish...I really do wish that we in this country were as receptive to ideas as the South Africa Constitutional Court seems to have been, and the founders of the South Africa Constitution as well. Because we seem...we do seem parochial at times and we seem sort of set in our ways, so...I would like to learn from South Africa. That would be my wish.

Int Thank you so much, Ursula, I appreciate your time. It's good to meet you.

UB Thank you. It's very good to meet you, thank you.

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