

**Pierre de Vos      Constitutional Court Oral History Project**

**4<sup>th</sup> January 2012**

Int      This is an interview with Professor Pierre de Vos and it's the 4<sup>th</sup> of January, 2012. Pierre, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

PDV     It's a pleasure.

Int      I wondered whether we could start by talking about early childhood memories, where you were born, your family background, and some of the formative influences that may have shaped your particular outlook of growing up in South Africa, and prepared you for a legal trajectory?

PDV     Okay (*laughs*). I was born in Musina, on the border with Zimbabwe, and my father was a lawyer, although he was, at some point, disbarred because he didn't use the Trust Fund, as he was supposed to use it. You know, it's like such a cliché. But we moved around quite a lot. After he was disbarred my father worked at different places; my father was quite a difficult person so he worked at different places. I lived in Hennenman in the Free State, and Sasolburg and Pietermaritzburg, and so on, and ended up in Polokwane, what was then Pietersburg, at Pietersburg Hoerskool. I don't really know what shaped my view of the world and so on. It must have been my father, I guess, because he was always a little bit ironic and mocking about the world, but also a bit critical...he always used to joke and say, you know, I don't understand the fuss about apartheid and why Afrikaners are so prejudiced about black South Africans. We have to refight the Anglo Boer War because the British were far worse than black South Africans could ever be. Something like that (*laughs*), so he was a bit quirky. So it gives you a little bit of a different, a bit of an outsider feeling, I suspect. And the fact that I'm gay maybe had an influence, as well, as it creates a feeling that one does not fit in and is not accepted. So maybe it gave me a bit of a different perspective on the world.

Int      About being different?

PDV     Ja, being different, being Other, with a capital O. You know, I was always a little bit different from the other children and my politics was a little bit different - although embarrassingly so now, if you ever think back, I mean, I was still racist.

Int      What makes you say that?

PDV I was so stupid and blind to the world around me. I was just oblivious to how the majority of people in South Africa lived. And ja, not thinking about people who are not white, in the same way as I would think about people who are white, and not according to them the same kind of dignity or respect or whatever you want to call it. And the problem was that I did not even know that I didn't know. That was until I went to university. And that was a big shift... But even before then I went right from school into the military to do my two years compulsory military service, and there I got a very big dose of being anti-power, anti the status quo, or whatever. The military just rubbed me up the wrong way and I just responded to it, I rebelled against it. So when I left the military, after two years of trying to disengage from everything that happened in the military I was already quite changed. I didn't become an officer or any of that stuff. And then I went to university and then engaged with politics, and learnt a little bit more about South African realities.

Int I'm going to take you right back. Growing up and moving around, and you mentioned your father but you didn't mention siblings and your mom and their influence on you; was it different?

PDV Well, I have four sisters. All with strong personalities. But how exactly they influenced me, that's always difficult to say. My mother's influence, although she was not very political, I think she was the person who was very...how shall I put it...she perceived herself to be, at least, very progressive, for a white Afrikaans woman living in a small town, let's put it that way. You know, like at various points she did things that conservative Afrikaans tannies (aunt/women) would not normally do. She had a flower shop, and at some point she sold insurance and one of her pride and joys in the world is that she sold Mamphela Ramphele an insurance policy. Ramphele at that time was banished to Bosbokrand and my mother sold her some insurance. Because none of the other white people would go in there. So in that sense, there was...maybe there was something, I don't know how much, what it did or didn't do to change me. But, you know, (*laughs*), I feel embarrassed to tell you these kinds of stories because I am worried it might sound like I want to say we were different from – perhaps better, more politically evolved than other white people. But we were not. In many ways we were not different from most other white people in South Africa. We had the same kinds of attitudes and we passively supported apartheid, I guess, although at the time I believed we were more progressive than the white people around us.

Int And then in terms of your identity, sexual identity and coming out, at what point did that emerge? Was that quite early on...?

PDV No, I was so clueless (*laughs*), I didn't really acknowledge to myself that I was gay until I left the country to do research for my Masters. I only left the country because Laurie Ackermann, who later became a judge on the Constitutional Court, organised funds to allow me to go overseas to the School of Oriental

and African Studies (SOAS) in London to do research on the Indian Constitution and Social Economic Rights. At the time he was at Stellenbosch University, and I did a Masters thesis under his supervision. And then I travelled through Europe and I met the first love of my life, a guy, and for the first time I recognised to myself that, oh, actually I'm attracted to men - both emotionally and physically.

Int And then coming back to South Africa, having discovered this aspect of yourself, what was the nature of the integration and the changes, the transition you had to make?

PDV Well, obviously there's that process of coming out of the closet and telling everyone that you are gay and so on. But I also became very political in the sphere of gay and lesbian politics. I worked for the Coalition for Lesbian and Gay Equality as a volunteer. We went marching and holding placards and when the Constitution was written we engaged with all the politicians and lobbied them - that kind of thing. And that was also good because although at university I was politically active in NUSAS and the End Conscription Campaign and all that...

Int This was at Stellenbosch?

PDV At Stellenbosch, ja, although they were...those institutions were banned from the campus, so it was all off campus of course, and this was now the 'Communists' or whatever, in inverted commas. But the involvement with the Coalition, I think, was interesting because that was really a far more real experience, working together with people of different races, classes, genders, backgrounds, and whatever. At Stellenbosch we were a bunch of whities quite pleased with ourselves. So that was a big learning curve for me, working on issues that I felt very passionately about, with other people who had the common interest. There was a common bond between us and, you know, I learnt from other people, I learnt that not everybody in South Africa is middle class, and that kind of thing. And I learnt more about race and how it impacts on our lives and how my own whiteness privileges me.

Int I'm curious, Pierre, in terms of your choices, having gone to Pietersburg High School, what made you decide to do law? Was it because your dad was a lawyer...?

PDV It was a very difficult choice as I wanted to do something professional, because I wanted to have a job that was going to give me a steady income... so that they won't come to take away all my furniture, like they did with my father (*laughs*). My father didn't pay his account at some point and the sheriff came and packed all our furniture on a truck. So I wanted to avoid that kind of drama. But I also wanted to do something interesting. The problem was I

couldn't be a doctor because I faint when I see blood, chartered accountant is too boring, engineering requires maths skills, which I did not have. And it's sort of by elimination that I decided, oh, maybe the law will be interesting. I didn't do it because I thought the law is going to change the world, no. It was only while I studied law and I did courses with people like Laurie Ackermann and then Lourens du Plessis, where we spoke about human rights and social justice, and I thought, oh, goodness, this is interesting, because I was always very much interested in politics. So this brought the law and the politics together for me.

Int When you say interest in politics, was this from an early age?

PDV Yes. I was interested in politics from an early age. I read the newspaper, every afternoon. My father would bring home the paper and I would immediately read it from front to back. It was Die Transvaler and later Beeld – not very progressive papers at the time - but still I read the newspaper. I wrote letters to the paper, which were published when I was at school. I wrote a letter once (*laughs*), so silly, but I wrote an angry letter because they didn't want to allow black children to take part in the Craven Week Rugby tournament. So as a schoolboy, and I said that I was a schoolboy, I wrote a letter saying, how ridiculous is this that they don't allow this. And it was published, I was very proud of myself.

Int Very interesting actually. So you were actually politically conscious...

PDV Yes, political, conscious, but you know, I'm embarrassed to say that the kind of political consciousness I had was not very evolved or progressive. Looking back now at what I believed and what I said, I feel a bit ashamed or embarrassed that I thought I was so progressive. But I didn't really know much. Nevertheless I believed at the time that I was politically conscious and I was interested in politics and I was always fascinated by politics, ja.

Int And in terms of reading the newspaper and the events that were emerging, what did you think about some of the events, for example, during the mid to late seventies, the early eighties, what were you thinking about the things that were happening then?

PDV Well, you know, at that stage, I think I had a rather schizophrenic attitude. I think I believed completely contradictory things, because on the one hand I was brought up very strongly in the traditional Afrikaner milieu and I was very pro-Afrikaner – white Afrikaner – and very loyal to the ideals of Afrikaner Nationalism. I think that's why I don't find it at all strange that some people who are very critical of the ANC vote for the ANC, because when I grew up there was this thing: even when you are critical you remain a National Party supporter. We believed only the horrible, terrible, white English people, whose

forefathers put our women and children in the concentration camps, only they vote for the opposition party. But at the same time I was in favour of change and for ending apartheid. I believed things had to change. And I was a big supporter of the people in the National Party perceived to be progressive, at least by the white Afrikaans community. So Pik Botha and Piet Koornhof (*laughs*), they were my heroes. I was very much opposed to the 'conservative wing', in inverted commas, inside the National Party. But I still very much saw myself as, well, as someone who had no choice but to be loyal to the Afrikaner party, the National Party. It was the only position that made sense to me - to focus on the then governing party, the National Party, and what was happening inside the party. I believed change would come from within the Nationalist Party. It was only when I left school and after I did my military service that I became rather suspicious of people who said that they had to work inside the system, and that they will change it from inside the system. I came to believe that one seldom changes the system from within. At that stage when you're nineteen or twenty years old, you think you know everything, so I thought you can never change the system from inside, it's just like an excuse to have all the benefits without any of the responsibilities.

Int Very interesting. I'm interested in your intellectual development; reading the newspaper, do you think it was lonely...?

PDV I was a lonely child (*laughs*), yes. Although I had four sisters, they often did their own thing and my parents mostly worked or they were busy with other things, busy coping with the world, so I often had to entertain myself. I would make imaginary radio programs on a tape recorder, I would go and play outside and pretend I'm the rugby commentator, or a cricket commentator, all on my own. So I was, in a way, quite lonely, ja. In any case, it wasn't as if politics was the kind of thing that you could speak to with other children, because they would think it was weird, they already thought it was weird that I read novels and poetry. Only sissies read novels and poetry.

Int And then the discourse, what did you do in terms of trying to unpack what it is that was getting formulated in your head about what was going on?

PDV Well, you see, until I went to university, I was not really aware how my own ideas were formed by the things I was reading in the Afrikaans press aimed at white people, and how I was steeped in all these assumptions about everything around me: from believing that Margaret Thatcher and Ronald Reagan are good leaders, to, you know, there must be orderly reform, and change cannot come via the ANC, because it is too dangerous. All these beliefs just seemed natural to me... I never questioned it, because it seemed so obvious... I was like a fish who did not realise he was swimming in water because the water is all around him, it wasn't possible to notice it. It's only when I went to university and I was part of this group at university that invited people to come and speak there – people like Archbishop Tutu and Reverend

Allan Boesak and Trevor Manuel when he was just released from detention. And so, you know, suddenly one is confronted by a completely different world, and you realise that you have been in a fish tank all your life. So even though I was critical of aspects of the world I lived in, I was still part of that system, which I couldn't see, I couldn't perceive a world different that is outside of that system.

Int In terms of your choice of Stellenbosch, and you mentioned the influence of Lourens du Plessis, and Laurie Ackermann, I wondered whether you could talk about that and your choice...?

PDV I chose Stellenbosch because I thought – I think at the time correctly so – that it was the most progressive Afrikaans university in the country. I believed that Stellenbosch would be the best University where I would be allowed to be a little bit different – better than any of the other Afrikaans universities at least. So that's why I chose it. It also helped that it was the University furthest away from my parent's house, which had an attraction to me. It was an interesting time to be a white Afrikaans student in South Africa with a budding political consciousness. Of course we were white students so we thought we were very important and we weren't at all. But there was a group of progressive students, you know, the NUSAS branch was formed and the End Conscription Campaign branch was formed, and I joined Die Matie, the student newspaper, which was a hot bed of quote unquote 'radicalism'. And that was fun. And it gave you something, a home sorts, with other people who didn't conform to the stereotype of the conservative, god fearing Afrikaner. Everybody was doing political philosophy and reading interesting books, and talking late into the night about politics and the novels they had read. You know, that was fantastic for me because for the first time in my life I was really intellectually stimulated, and really my head was spinning with new ideas.

Int I'm curious about your peers at the law school; was there legal activism, did you get a sense that law could be used as an instrument for social justice, at that point?

PDV In the law faculty there were not many people at the time who thought that the law should be used to change the world for the better. Most people were quite conservative, and the vast majority of both the lecturers and the students, my fellow students in the law faculty, were quite conservative. So there wasn't a lot of debate about how the law can change our world. It was only in the smaller classes towards the final year of the LLB studies that those ideas came to the fore. Lourens (du Plessis) presented an elective course on jurisprudence, and gave us all these ANC documents and pamphlets to read as well as discussion documents about Human Rights. Then the penny dropped and I thought, oh yeah, there is such a thing as a Bill of Rights, and one can fight for change through the law. But that was not by any stretch of the imagination the dominant discourse at the law faculty.

Int And then at what point did you leave the country, because you mentioned Laurie Ackermann getting you sponsorship...?

PDV After I finished my LLB, I went to work as a journalist at Die Suid-Afrikaan, which was this progressive Afrikaans bimonthly magazine. Because of my work at the student newspaper they asked me to come and work there, and I worked there for a year. And then I went back to do the Masters thesis under Laurie Ackermann, and that was in 1990, just as things were starting to change inside South Africa. Ja, 1990, things were just changing when I left, ja, for the first time.

Int And that transition, how did you experience it? What was your sense of what was happening in the country in terms of discourse? What were your concerns, if any?

PDV Its difficult to say now, really, what I was thinking ... one has a tendency to make up a story afterwards, I suspect to suit your current views. But I remember the day when President FW De Klerk made the big announcement that the ANC would be unbanned and Mandela would be released. I still had a girlfriend, and we were watching this on television, and at first we were like, ah, this is impossible, we can't believe it, there must be a trick, they are tricking the ANC. At that stage I was very sceptical of the National Party, and I believed at first that the nationalists were just pulling the wool over our eyes. There was a lot of concerns about what are they up to? But gradually we realised that there was a real change and it was very exciting, it was like, wow. We all went to see Nelson Mandela giving his first speech on the Parade after he was released from prison. And I was wearing my Nelson Mandela t-shirt with the worlds "welcome home" printed above his face, and when he arrived and started speaking we were crying; it was like everything is going to change. So it was very exciting.

Int And you left later that year?

PDV I left that year, later that year, ja.

Int And you went to England?

PDV I went to England, not for long, only two months, three months.

Int And then coming back and...?

PDV Then I came back, and then I had applied for a scholarship to go and study in the States, which I sort of halfway got, and scrounged together the money and then went to study in New York.

Int And your experiences of studying in New York, American law, and this was at a time where the Constitution was really coming together....

PDV Yes. It was interesting because I was a little bit disappointed with the American legal system and constitutional law, because in my head, from all the kinds of proposals that I had been reading, I was filled with far more radical ideas than the ideas confronting me in the US. You know, the ANC came out with their first constitutional proposals and it included a set of social and economic rights and all these things. And so then I did these courses with Prof Louis Henkin at Columbia as well as a course on race and social justice, which included a lot of discussion on affirmative action in the US context. And I found the discourse in the US was quite conservative compared to what was happening in South Africa. And it was a time when the court in the US was starting to become more conservative, so it was rolling back the gains of the Warren (reference to the US Supreme Court during the tenure of Earl Warren between 1953 and 1969 as Chief Justice) era. It was the time when Bill Clinton was running for president and he was the ultimate “triangulator”, sitting on the fence, so although he was supposed to be a Democrat, he was quite conservative. And also the law, it wasn’t...the tools of the American Bill of Rights wasn’t as powerful as I imagined it could be. So I came to the conclusion we shouldn’t follow the American model. Like most people in South Africa who were progressive we were looking more to Canada or to Germany or India for inspiration.

Int I’m curious about your development, especially about your legal trajectory and your interest in the Constitution...

PDV Well, I was very much interested in the whole process of constitution making because there is also a political component to the process and it is about power and negotiations and political manoeuvring. I was always interested in the way power works, and how the forces that are at play produce certain results, certain outcomes. Although when I came back from the US and started working at UWC, I was first asked to teach criminal law. And law of evidence, if I remember, which I didn’t know anything about. So, I taught criminal law but I was always wanting to get more involved in constitutional law, so when an opening occurred to teach Constitutional Law I jumped at the opportunity. I said, yes, this is what I want to teach. Because, although I loved the criminal law – I loved all the sad stories in criminal law judgments - the constitutional law was more attractive still – especially the parts about the Bill of Rights. I guess, it is because the Bill of Rights is very much about changing the law and addressing injustice, using the law for achieving or addressing, to some degree at least, the injustices in society. So that appealed to me. And,



you know, I heard all kinds of radical things about how the Bill of Rights must be interpreted. We were very starry-eyed at the time (*laughs*) and believed the courts should use the Bill of Rights to change everything.

Int You've written this article, which I'd like to talk to you about some point, about the Constitutional Court being starry-eyed in the face of history. I'm really interested in that. But at that point, Pierre, if you had to look back, what were your memories of that entire process, the Constitution making process, and then also the inception of the Court? Did you think that there needed to be this Constitutional Court and there had to be an apex court, what were your thoughts...?

PDV I was very much in favour of the proposal to have a separate court. Because my perception, like many other people's, were that we could not trust the people in Bloemfontein (at the Supreme Court Appeal Court) to interpret the Bill of Rights, because at that stage I was aware enough that legal texts do not interpret themselves. They are interpreted by human beings with certain ideological views as well as certain professional commitments and these things will influence how they interpret a legal text – especially one like the Bill of Rights worded in general terms. So creating a completely different court that would be more legitimate and that would also be more progressive, because of the people who would be appointed to it, I was very much in favour of that. But my interest was never really in the technical processes of adjudication, so wasn't going to make arguments about the technical complications regarding the jurisdiction of the various courts and the potential confusion about whether the Con Court of the SCA (Supreme Court of Appeals) had jurisdiction. And, let's face it in the Interim Constitution it was actually quite a mess, this question of jurisdiction. Because the Supreme Court of Appeal didn't have any constitutional jurisdiction, the Constitutional Court did. In the beginning no one knew how to separate the two and how to decide when something was a constitutional issue and when not. But that didn't really interest me. It was more like, yes, we have to have a new court, this is one way of doing it and I was very much in support of it.

Int And in terms of the early inception and process of the Court, the choice of the President of the Court, the choice of the particular sets of judges, the Judicial Services Commission interviews, what were your observations at that point about these processes?

PDV Well, it was...what was it, I'm trying to think back now. I think – and this is going to sound strange – but I almost felt it was predetermined who was going to be appointed on the Constitutional Court. Thinking back now I feel that most of us, I knew, more or less, who was going to be on the Court. There were one or two exceptions, you know, like maybe Judge (Tholie) Madala was a surprise. But we knew there had to be a woman, so who's going to be the

woman? Oh, well, you know, Yvonne Mokgoro was an obvious choice. Or Kate O'Regan was an obvious choice.

Int Were they obvious choices given that Kate (O'Regan) was an academic?

PDV I don't know... but at the time it seemed anything was possible and that those who made the appointments would not stick to the old formalistic views about who would make a good judge. So there was...maybe I'm thinking it, making the story up after the fact, but I think for me it was, yes, of course, they're going to be appointed because you have to have progressive people appointed to the Court and they were the obvious choices. You have to have women on the Court. You have to have a balance of people based on race and some people with judicial experience. The whole way the Interim Constitution was structured also, it made it very clear that you didn't have to have only sitting judges. There couldn't only be sitting judges because the sitting judges were the very judges appointed by an apartheid government. So there were going to be non-judges appointed. So they either had to be advocates or academics. So it wasn't a strange thing to have academics appointed to the Constitutional Court. Now, I don't think it's going to be easy for an academic to get on the Constitutional Court again, but then it was possible because there was this Prague Spring kind of atmosphere, everything was possible. So the choices like people like Laurie Ackermann, yes, we knew he was going to be on the Court, and (Richard) Goldstone, and you know, (Arthur) Chaskalson.

Int Albie Sachs...

PDV And Albie Sachs, although he got a very hard time at the interviews, because of his involvement in, if I recall, the investigation of what had happened in the ANC camps at Quatro and the allegations of atrocities or abuses taking place there, and he was asked about what he did with the information he gathered and so on. Some people, especially the more conservative people on the Judicial Services Commission, gave him a very hard time. But I thought, you know, it would have been an injustice for him not to be on the Court. And in the end he did make it, and he turned out to be a good choice.

Int I'm curious what you think about the initial set-up of the Court in terms of the cases that came there; the death penalty is something that you've written passionately about? And also the early cases, and what your sense is of the kind of impact it had on South African society?

PDV You know I don't know. I think that it was difficult for the Court because this was a new Court and it was called upon to make very difficult decisions. I feel that, especially in those first few years, the Court was often between a rock and a hard place. One the one hand, it wanted to make very bold

pronouncements about the protection of human rights to demonstrate the decisive break with the past – something the late Ismail Mahomed spoke about. It had to demonstrate that this was not business as usual. So that explains the death penalty case, for example. But at the same time the judges were a little bit nervous, it seems to me, not to want to be seen to usurp the power of the, now for the first time, democratically elected legislature and the executive. So there was a tension there between showing respect for the separation of powers and making bold judgments in defence of human rights. By making the bold judgments that it did, first with the death penalty (*S v Makwanyane and Another*), then with a lot of criminal justice cases, it alienated some people. You know, it was a time when especially in the chattering class, especially among white people, the crime issue was just starting to bubble up. So I think it cost the Court some support among elites and among ordinary middle class people, if you will, when it was perceived to be protecting the so-called “rights of criminals”.

Int You mean white South Africans?

PDV Ja, mostly white South Africans at first were rather sceptical of the Court. But this scepticism was not exclusively coming from white South Africans, but mostly white South Africans. And so, even ten years later when they did public opinion surveys, black South Africans were far more supportive of the Constitutional Court than white South Africans. And I think one of the reasons is that white South Africans did not like the bold decisions protecting the rights of accused persons and of convicted criminals. There was a Zapiro cartoon at the time, where all the judges, (Arthur) Chaskalson and all, were leaving the Court but wearing Groucho Marx style glasses with the fake moustaches, disguises, after the death penalty case was handed down, because (according to the cartoon) the judges knew (*laughs*) they would be lynched by the white South Africans who wanted the death penalty retained. So yes, but at first there were not many early cases, which, I think, captured the popular imagination, apart from the death penalty case. I mean, there were other cases that were very important, like the Western Cape case (*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*), where the Court declared invalid the president’s action in changing the legislation, because separation of powers and so on. But it wasn’t something that registered in the popular imagination. I don’t think it registered, as far as I can remember, as much. Although (President Nelson) Mandela went on TV after the Western Cape (*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*) case was handed down and said, “we respect the Court decision”, you know, so some of those judges say this is the moment where we knew that the system was now settled. Until the sexual orientation cases (*National Coalition for Gay and Lesbian Equality v. Minister of Justice; Satchwell v. President of the Republic of South Africa and Another*;

*Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae); J and Another v. Director General, Department of Home Affairs, and Others* ) probably, in the popular imagination I don't think there were that many cases that grabbed the populace and made them sit up and take notice of the Constitutional Court as a political institution. In the academic environment there were lots of debates about horizontally and whether, you know, to what extent the Bill of Rights, and the values in the Bill of Rights, should influence and be used to change the other law especially the common law. I guess there's still a big fight to this very day between the common law lawyers who are often conservative and want to insulate that law from the Bill of Rights and the constitutional champions who want the common law transformed by invoking the Bill of Rights. But in the popular imagination I can't remember too many cases, which caused a stir. But maybe I'm not remembering well.

Int I'm also curious, at some point earlier you said that the judges had to be progressive, but just taking your cue from, for example, the US Supreme Court, you don't think that there was some concern that all the judges had a particular ideological or human rights bent, and that it would not be representative of South African society in the main?

PDV Well, you see, at the time, personally, if I speak only for myself, I perceived the whole constitutional project as part of what has now become known as the transformative project. I believed that the judges will – and ought to – play a big role in helping to transform the society. And I believed that the judges needed to be progressive as they were the ones that often would have to spearhead change – especially on human rights issues. This was my perception at the time - I've changed it a bit now. But especially on social issues, gender issues, sexual orientation issues, and so on, I believed (and still believe) that the courts have an important role to play. Because the elected politicians will often be too scared to fight for these issue, although many of them might feel that there's nothing wrong with it, they would be too scared to actually do what is necessary to be done to change the law to protect vulnerable groups. So I was very much a champion of an activist court. And at the time I thought: who cares if the people don't agree with the Court's judgments, because we will take them with us, we are going to change the whole society and then everybody will stop being sexist and stop being homophobic and stop being racist, and believe in social justice. The courts will make sure of that.

Int How have you changed, and what's made you change?

PDV Well, I've realised that it's difficult for a Court given the institutional weakness and lack of democratic legitimacy to do all these things. I think it is a bit dangerous to invest all that hope of change in a Court which is, after all, the unelected branch of government. But it is also maybe a little bit naïve to

expect a Court to do this, because mostly judges are appointed because they can be 'trusted', in inverted commas, because they will not interpret and apply the Constitution in a manner that would require too radical change. So there are not many radical people who are appointed to become judges. And secondly, and this is the argument that Dennis Davis also often makes, is that the system will take a lot of strain if the judges become too activist and the judges are too far ahead of where the politicians are, and the other elite people are, or where the ordinary people are. They need some support from other power blocks in society, I think, for them to retain their legitimacy and their power. Otherwise the whole system could collapse if they are alone at the front, pushing for change, when society as a whole, or at least the elite groups, are not ready to accept the change.

**Int** It's curious because in your blog more recently you speak about Ziyad Motala in the US saying that the decision in the Simelane (*Democratic Alliance v President of the Republic of South Africa and others –reference here to Supreme Court of Appeal judgment*) case was 'politics masquerading as law' and you actually in some ways, do agree partly with him, and I wondered whether you could talk about that?

**PDV** Yes, well, you see, it's also the way he formulated his argument that irked me, but I do not think one can draw a neat distinction between law and politics. What I find obnoxious and dishonest is to say you can make a distinction between politics on the one hand, and law on the other hand and that the courts should keep to the latter. But often constitutional interpretation and adjudication would be inherently political. I think there is a continuum and that some issues can perhaps be classified as more political and others can be placed on the other side of the sliding scale as being more legal, but a bright line does not exist between the two. Politics and law are inevitably entwined, and the interpretation and application of the law often has political consequences. And in a constitutional democracy many constitutional judgments will have profound political consequences. If you outlaw abortion it has huge political consequences. The death penalty, all these things, these are also political issues. So just to claim that you can make the distinction is dishonest, it seems to me. So having said that, then the thing is to know that certain issues, although there are so many issues that a constitutional Court in a constitutional democracy has to deal with that will have political ramifications, a wise court will try and be aware of their precarious position, and the way in which they make decisions, in which they justify the decisions, will take that into account. But at the same time, you know, will be a little bit strategic perhaps, let's put it that way, in which kind of bold decisions they're prepared to make and which ones not. So some issues are more important than others. And some issues are more worthy of sticking your neck out for. Like I think this...ja, whether it's now Simelane issue or the previous case that was quite controversial about the Scorpions and the Hawks (*Glenister v President of the Republic of South Africa and Others*), sometimes it is

important for a court to stick out its neck and take the consequences of making a decision with political ramifications.

Int I'm curious, you've once described the Constitutional Court as 'fearless. How has it been fearless and does it continue to remain so?'

PDV Well, it's fearless...did I say they were fearless?

Int Yes, in your blog.

PDV I was very kind (*laughs*). They are sometimes fearless in the sense that they will not shy away from making a decision merely because it will upset somebody in power. Although that does not mean I think that they are not political in the sense of being aware of the political ramifications of their decisions. When I say they are fearless I do not mean they are oblivious or naive. But they are fearless in the sense that when they believe that something is really important, they will make the decision no matter what. And they will make quite a bold decision. I mean, the Treatment Action Campaign case (*Minister of Health and Other v Treatment Action Campaign and Others*) you know, in the face of consistent opposition of the Minister of health, was fearless – although the government was busy changing its position. But still we knew behind the scenes, there was a Minister of Health and a president who was very much opposed to this whole “nonsense” of giving people ARVs. And they just made the decisions very boldly. The Court just went ahead. So, I think they are not scared of upsetting people, in that sense I would say they are fearless. Which doesn't mean they are not sometimes careful not to make decisions that could be criticised for overstepping the boundary of their own power and trenching on the separation of power doctrine. I think there is a distinction. But I also think many of the judges still naively try to hold on to the distinction between law and politics, and they use the separation of powers doctrine as their lodestar and they are aware and they are worried to overstep the boundaries and to encroach on the terrain of the other two branches of government. But when they think that the Constitution is requiring them to do so, they will be quite bold. So there's a bit of a slippage there, I think, on part of the judges of the Constitutional Court, because on the one hand they want to keep this boundary between the law and politics strict, but on the other hand they actually recognise that you can't. And that they use the separation of powers doctrine really to manage that tension that is there.

Int It's interesting because in the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case, some members of the judiciary, and I don't mean the Constitutional Court, have complained that that's where in some sense the Court really overstepped its mark and tried to govern. Do you think that was the case?

PDV Well, I understand why some say that, because it was a bold decision. It's a bit like the decision regarding the abolition of the Scorpions. Also a bold decision. "Very brave", as Sir Humphrey in *Yes, Prime Minister* always said when he wanted to warn his Minister that he was doing something foolish, (*laughs*). I think in that case the Court wasn't overstepping the line, but this is a complicated argument, so I'm not sure if I'm correct. In any event, I think because of the context within which that decision happened, a context in which a very strong civil society movement agitated for change and mobilised society in favour of the judgment, it was not as dangerous for the Court to make this very bold decision. And this goes back again to the previous discussion of, can the Court change everything? The Court can help to change things but it helps when there is a strong civil society, and there's a strong movement, like the TAC. In that case (*Minister of Health and Other v Treatment Action Campaign and Others*) the TAC garnered support throughout South Africa, all the media was on their side, they drummed up international support, Cosatu was on board. They got awards from MTV. All these kind of things helped the Court. There was such a groundswell of support and we went on marching to Parliament, twenty thousand people, to demand the government provide ARVs. That was a big march. So that made it easy for the Court to make a bold decision, because they had support from groups in society. There's this article by Theunis Roux, which the judges hate, where he talks about the fact that our judges veer between pragmatism and principle.

Int I'm going to ask you about that.

PDV They were saying, oh, no, this is dreadful, we don't think like that, we just think about the principle. But I think judges are human beings and they are influenced by what happens in the larger society. Whether they think about it or not, I think it does work like that a little bit. If you have allies as a court, a decision that otherwise might be problematic, becomes less problematic if you have strong allies in one of the power blocks in the society. Whether it's the civil society, whether it's the governing party, whether it's one of the alliance partners, whatever. But I don't think the Court...the judges will say that never plays a role, but I'm not so sure (*laughs*).

Int Give an example of where it does?

PDV Where it does play a role? Well, I must think now but...for example, I'll use the latest really controversial decision from the Constitutional Court, dealing with the Scorpions (*Glenister v President of the Republic of South Africa and Others*). The Court made a very brave decision in many ways by declaring the legislation creating a new crime fighting unit unconstitutional because the new unit was not independent enough. Let's face it, they sucked it out of their thumb really, they made up an argument why they're going to declare this whole thing unconstitutional and gave Parliament two years to fix it. And, you

know, one would have thought that the minority, (Sandile) Ngcobo's judgment, would be the one that they would normally go with as it was the safer and jurisprudentially less adventurous decision. But about corruption, there's been a sea change in society since the time they actually amended the legislation, and groups like Cosatu are very much outspoken about corruption and the need to fight it. And they have stopped complaining about the Scorpions and the abuses of the Scorpions because they're not friends with Zuma anymore. And civil society groups have been going about complaining about corruption. And the media, you must never underestimate the media. The media has been *gaaning* (*going*) on about corruption, and if you have the media on your side it's a strong ally to have. So, it made a bold decision, but they had some strong allies to protect them from any political fall out. And you can say the same thing with say, the gay rights cases (*National Coalition for Gay and Lesbian Equality v. Minister of Justice; Satchwell v. President of the Republic of South Africa and Another; Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae), J and Another v. Director General, Department of Home Affairs, and Others*)

Int Same sex marriage?

PDV Ja, same sex marriage (*Minister of Home Affairs v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others.*) Where the media also was on the side of the same sex marriage decision. And with a few exceptions columnist, one of them now being South Africa's ambassador to Uganda, but mostly the media has been supportive. And there's been some within the ANC there was support from the leadership, if not the rank and file, but from the leadership for such a decision, which made it possible. If the ANC were implacably opposed to same sex marriage, and the media was lukewarm, I wonder if they would have made a decision in favour of same sex marriage. That would have been quite foolhardy... But, I guess the Court had painted themselves in a corner with all their jurisprudence on sexual orientation issues before, but they might have found a way out, I think. I don't know. But I'm speculating, it's a bit naughty, but ja...

Int So in light of all these arguments you've made, I'm curious about the Joe Slovo case (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*), and what happened?

PDV Yes. You know, I don't know, there were those cases in the...when the four judges retired...

Int You're talking about Albie Sachs...

PDV Ja, Albie Sachs, Mokgoro, and O'Regan...who was the fourth one?



Int Pius?

PDV No, no, Madala, I think. I think there were a few cases there where its decisions were a bit strange. Because there's also the Mazibuko (*Mazibuko and Others v City of Johannesburg and Others*) case, the water case, that Kate O'Regan wrote. I was very scathing about that one because she started off by saying, "water is life". And then my headline was, "water is life, but life is cheap" (*laughs*). She still speaks to me nevertheless. I don't know what happened there because if you take the Johannesburg cases, there the Court has been far more prepared to use mechanisms to try and manage the situation. You know, the meaningful engagement thing. Which I think it's one of the mechanisms they use to try and solve the separation of power tension. But in Joe Slovo (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*) they claim that there was meaningful engagement, which factually, I think, is a stretch. There was consultation in the sense people were told they would be moved. But in my opinion there wasn't any meaningful engagement. But the Court claimed that there was meaningful engagement. Why they did that? I have a suspicion there are two reasons. The one is that because it was such a huge group of people, it was such a flagship policy of the government, so it would have been a huge thing if they just declared it invalid and had refused to remove the residents of Joe Slovo to allow the upgrade. And the second thing is, I was wondering, I don't know, but I was wondering whether the fact that it was in the Western Cape had anything to do with it. And there was also the politics, because the judge who originally gave the order was John Hlophe, whom they had been embroiled in a fight with. I don't know if it plays a role, but it immediately came to my mind when I thought, hmm, here they're now agreeing with the very judge with whom they are having a huge fight, and there's the fight to the bitter end here, going between them, and this judge, but now they're not disagreeing with him. They're disagreeing with him but in a subtle way. So maybe they thought that this decision gave them some credibility and affirmed their impartiality and independence, not overturning the judgment of the very judge they are having a fight with.

Int So really, this brings you back to the argument that the politics of the country is not irrelevant...

PDV No (means Yes)! I think the judges will deny it. But it immediately struck me that this case, they dealt differently with, especially the meaningful engagement criteria than they did in many other cases, before and after. And the fact that John Hlophe wrote that original judgment, it did cross my mind that it might have something to do with it, ja. And it wouldn't be surprising, even subconsciously, whether it wouldn't play a role.

Int I wonder what you think of Theunis Roux's issue of pragmatism and principle and that dichotomy, whether it's a false one?

PDV (*laughs*) Well, I'm in a way attracted to it. I'm not sure it works and that one can describe or catalogue all the judgments as neatly as Roux does, but I'm attracted to his argument in principle. I think it seems like a helpful way to describe what the Court does – at least some of the time. But whether one can always use this rubric to understand what the Constitutional Court does is debatable.

Int How do you understand it?

PDV How I understand it, how I would put it in simple language for a lay person is, it's like the Court has a bank account, and you have to have money in the bank that you can withdraw when the times are rough. And so the Court needs to be pragmatic sometimes and not make too bold a decision, pragmatically "banking" some goodwill, saving that goodwill for a day when it really mattered. When the issue is not that important for the protection and promotion of the long term constitutional project or the protection of extremely vulnerable groups, one can soften or bend one's principles slightly to gather some goodwill for a rainy day. And you strategically give up some issues, which ideally, if your own personal views were the only ones that held sway, you would have gone the other way, but you let it go. And you build up some credibility and legitimacy with those groups whose support or acquiescence you will need in other cases. In order to rule correctly in the big cases where there's a real test for democracy or for the rights of really vulnerable and marginalised people, you must at other times be a bit circumspect. This allow you to save up some goodwill which you can extract at a later stage. And the way that I differ from Theunis Roux a little bit is, I think it's far more complicated, and that there are far more constituencies whose goodwill is in play in every decision. I think he simplifies a bit and disregards the fact that society is not made up of only a few power blocks. For example, he argues that one of the interest groups in play is the government, the ANC, and you're either with them or against them. I think it's more complicated than that. I think the Court has many constituencies and without perhaps even knowing it, it is...when it makes a decision it satisfies some constituencies above others. And I think for the Court it's sometimes just as difficult to make a decision that they know is going to upset the civil society, and the academics than it is to make a decision that would upset the ANC. I think they are stung by the kind of criticism from academics and civil society, that, oh, you are not doing the right thing, you are forsaking the poor or whatever. And sometimes they disregard that also, for pragmatic reasons. That's another constituency. So I see it a little bit more complicated and a process that is fluid and it's not just...the dichotomy is not as clear-cut, but the contours of the argument seems to me attractive.

Int What do you think of Theunis Roux's idea of the Court as the 'Chaskalson Court'?

PDV (*laughs*) It's interesting because when Arthur Chaskalson was the Chief Justice, the rate of dissent by other judges was quite low. So compared to that era the Court has splintered a bit now. There's far more very sharply divided decisions. More of them and more sharply divided, although the language is not nearly as vigorous or as horrible as, you know, the kind of language used in the US by Judges like Scalia. But it's a little bit sharper, the distinctions and the disagreements. And during the Chaskalson era, it appears from the outside...what do I know... but it appears that he was quite a forceful and persuasive person, and that he managed through his charm and his persuasion and his intellect, and whatever, to get a lot of people on board. Especially with the important cases. Like, you know, the *Grootboom Government of the Republic of South Africa and Others v Grootboom and Others*-case, and the TAC (*Minister of Health and Others v Treatment Action Campaign and Others*). In the TAC case even, it's just the Court writing the judgment – no name of a judge is given. So I think there might be something in it that there was a Chaskalson Court, in the sense that he exerted a lot of influence... either on his own or in an alliance with a few other of the judges of that era. I don't know whether you can call it the Chaskalson Court, but there was definitely a coherence, there was a certain coherence there, that was also maybe because not only of him but also because it was a new Court and there was a need for establishing a jurisprudence, and so the idea of...the fact that the Court was so collegial, that they really tried to get agreement on issues, because they knew that this was going to make law, this is like every case was a precedent setting case. So I think there is something to it, ja.

Int What did you think of the change then from (Arthur) Chaskalson to Pius Langa,? In those years, what are your observations of those years of the Court under Pius Langa?

PDV I think Pius Langa is a wonderful man, and he's a wonderful jurist. I don't think he is as forceful a presence as Chaskalson was. So it was a bit of a transition period, I think. It's difficult to pinpoint it this way or that way, you know, I think, ja...it's difficult to give it one name. I think it was a transitional period then, which came over to the (Sandile) Ngcobo and now (Mogoeng) Mogoeng eras, where there's more of a division on the Court it seems than there was before.

Int In what sense?

PDV Just that there are more...it seems to me that in very important issues, there are sharply divided opinions from different judges. And even when the Court is not sharply divided there's more strongly worded dissenting opinions, you know. (Justice Zak) Yacoob, he's has written very strongly worded stuff, which

didn't happen before. And I wonder whether that might also have something to do with the dynamics between the Chief Justice and the Deputy Chief Justice. Because there's this Deputy Chief Justice who was the Chief Justice in waiting, but is now forever remaining the princess... That must create some tension that was not there during the Chaskalson era.

Int Why do you think that is?

PDV Well, once again it's difficult to speculate but it must be difficult for Justice (Dikgang) Moseneke. He was made the Deputy Chief Justice, there was surely a belief among many people that he would become the Chief Justice, and then he was overlooked now twice. And he's a towering intellectual figure as well as quite a strong leader. And also a forceful personality. And so I'm wondering, maybe it's too easy, but I'm wondering whether the fact that there is now this person there that never got to be the Chief Justice, whether that doesn't create some tension between the Chief Justice and those that align with him, and the Deputy Chief Justice and those who align with him. Although it doesn't always work that way because it doesn't always split along exactly the same ideological lines as is the case in the US. It's not like in the US where it's always predictable how it's going to split and how the judges will vote, but I just wonder whether that absolute collegiality that used to be there in the Chaskalson era might have been a little bit watered down...might be fraying at the edges a little bit. Which will then come out in the judgments itself. There will be less willingness on the part of judges to try and get to the consensus, if there is a little bit less of that absolute generosity of spirit on the Court, which is almost unheard of for a Court, ja. In the Anglo American tradition at least.

Int It's interesting, Pierre, because you bring up the collegiality, and much has been made about that first Bench and the collegiality. In terms of the first Bench and its approach to judgments, what's your sense of the avenues they took to judgments and judgment writing, the fact that they had the conferencing?, what did you think about all of that when it was happening at the time?

PDV Well, sometimes, at the time of course, some of us were a little bit critical saying, the more progressive voices are being stifled (*laughs*). Because there was so much emphasis on trying to get it right, trying to get consensus firstly, and then trying to...if there was no consensus, at least to engage with one another in a very polite way. And of course sometimes the judgments were not as progressive as some of us would have liked them to be, especially on gender issues. And then one would have liked to see more like stronger...more strongly worded responses, saying, what's happening here, this is just nonsense.

Int You said gender issues, can you tell me about a particular case that you think...?

PDV Well, there was the Hugo (*President of the Republic of South Africa and Another v Hugo*) case, and there was the Jordan (*S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae*) case, and there was the Volks versus Robinson (*Volks No v Robinson and Others*) case. All three of them dealing, in a way, with some kind of gender discrimination, in which the Court couldn't really see...it seemed to me at least...the harm of gender stereotyping and the effects of facially neutral rules on women. They didn't really use their own so-called impact test for equality in these cases and suddenly became less enthusiastic about the concept of substantive equality. They didn't ask, so how does this actually impact on the group – which happens to be women? Or they misidentified the group that is being impacted. Like in the Jordan (*S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae*) case, the majority thought, well, a law that criminalises sex workers but not clients impacts on sex workers only, not seeing that the law really contains a stereotype about women and their sexuality, a harmful stereotype. And there the majority's moral piousness got the better of them, I think. They didn't think, well, this actually about stereotypes. A law that stereotypes all women. Because the law impacts on all women, because it contains the notion that women's sexuality is dangerous and must be contained, while men who make use of sex workers are presumed to be doing what men do. And in the Robinson (*Volks No v Robinson and Others*) case, the law that distinguished between married and unmarried women was found to be perfectly fine. The majority in *Volks v Robinson (Volks No v Robinson and Others)* did not really grapple with the fact that many unmarried women in relationships are very vulnerable and needs protection. They ignored the fact that, more often than not in our society, given the history and the context, it's going to be a woman in a non-marital relationship that is going to be vulnerable and will be open to exploitation. And they never managed to identify what the real harm was for some reason.

Int I'm curious because you talk about morality, and in terms of non-legal considerations do you think that certain doctrines do come into play in the decision-making?

PDV Well, I don't know if it's doctrines. It's more like people's personal lived experience and reality. If you have judges who are married for fifty years, who live in a certain refined middle class milieu, they might find it difficult to get their heads around the fact that some women become sex workers to survive and that sex is not such a big deal. And when they are confronted by an unmarried Ms Robinson, they cannot see that Ms. Robinson did not choose not to get married but that her male partner probably held most of the power in that relationship and made the choice on her behalf. Most people do not know

that they embody certain norms, they believe the world is and should be the way they themselves live their lives and that this is not an ideological choice but just “natural”, and they are often not even aware probably that they are embodying this norm and that it influences the way they judge others and the way they look at discrimination. I think that judges cannot escape from these kinds of views and values that are steeped in, that they don't even see.

Int I'm also curious, you've written about the Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) case, there's so much has been made about Mrs Grootboom and the fact that she died and her housing dream never came to fruition, I wondered what your sense is of the judgment that was written by the Constitutional Court?

PDV At the time of course some of us were ...well, some of us who were writing about socio-economic rights were very critical of the judgments. We were happy about the judgment in the sense that it at least went further than the Soobramoney (*Soobramoney v Minister of Health (Kwa-Zulu-Natal)*) judgment. At least the Court moved beyond the rationality standard, towards a standard of reasonableness to judge the government programmes. But they rejected the whole notion that there could be a minimum core obligation that the state has to fulfil as a priority, and we were very cross with the Court for doing that because this seemed to mean that one would not have an individual right to demand that the state provide you with the basic minimum to survive or to live a life with the semblance of human dignity. So we were quite critical of it. But at the same time there was something there that you could hold onto and that you could use. I'd written also about how I think it goes hand-in-hand with equality concerns. And I think, in retrospect, maybe being a little bit less naive...expecting a little bit less of judges, expecting less that judges would actually just change the whole world in the face of the democratic branches of government's lack of doing it, the judgment was not so bad. I think there's a lot in that judgment that can be used to hold the government accountable. And that was then used by the TAC, for example, in many ways. One can use the jurisprudence to mobilise the public and then also to go to Court. And the Court probably went a little bit further in TAC than it did in Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*). But it did give them something. But one of the good things about the Grootboom(*Government of the Republic of South Africa and Others v Grootboom and Others*) (*Government of the Republic of South Africa and Others v Grootboom and Others*) judgment - and all the lawyers say this now, it's one of the lessons of the Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) case - is that if you want to go the socio-economic rights litigation route, and you're a community, it helps to have organisation, political organisation. If you just hope that a court case will change everything and you think the judgment is going to solve everything, that's not going to be very wise. Because, as everyone keeps pointing out, Mrs Grootboom never got a house until she died. If one had a legal strategy and teamed up with a larger movement, say the landless

people's movement, or *Abahlali baseMjondolo* or whatever, group that were agitating politically, organising the community, that could sustain the energy that the case created, then there would have been more movement and a better chance of translating a legal victory into a material change in your life.

Int But that didn't happen for example in the Joe Slovo (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*), case, which was highly organised.

PDV Well, the community was organised in an inward manner. But it was not organised in the sense that it generated a lot of sympathy from the media and from other important role players. But in any case, in the end the residence of Joe Slovo won their reprieve because the eviction never happened. That judgment (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*), is in many ways interesting because in retrospect it's a bit of a Solomonic judgment because it appeared to give the government what it wanted but in such a way that it was impossible for the government to execute the court order. Because the government had to engage meaningfully with the residence and actually had to provide alternative accommodation, and do the things it that it had now promised it would do, it found itself in a position where it could not evict the residents because it could not deliver on these promises.

Int I'm interested in judicial transformation...

PDV Ja (*laughs*).

Int And the idea of it as being more than just demographics. What are the broader questions of judicial transformation?

PDV You see...obviously the starting point, as we all have to say to ensure people do not misunderstand you, it is important that there be transformation of the judiciary in terms of race, gender, etc. An all white, all male judiciary is surely untenable. But that just the start as it would also be quite a good thing to have more judges appointed who come from a working class background. But then, over and above questions of one's race and sex and class, it seems to me one does not want to replace white male conservative judges with black male, or black female, conservative judges. So you want judges who are a little bit attuned to what one could call the values of the Constitution. Of course those values are quite amorphous and difficult to pin down. Some of us are still looking for the objective normative value system embodied in the Bill of Rights, which the Constitutional Court speaks about. And it might be a bit difficult to determine exactly what we are looking for. But, speaking personally, what I really want to see is the appointment of judges with more of an understanding of the Other, somebody who understand the way in which the

dignity of those who are not like oneself are denied; somebody with a sense of social justice; a person who can actually put themselves in the shoes of other people; who can actually think that, yes, one must think yourself in the shoes of somebody else, somebody who's not like me, somebody who's poorer, somebody who's of a different gender, or sexual orientation, or language, or ability or whatever. And to try and think about that, to think of the Other, if that's now a term without too many connotations to use. And I don't think that always happens. So some judges have been appointed, both black and white, both male and female, who are not very progressive in their values. Because they still have to interpret and apply the Constitution and the law, and what their values are will have an influence on that, this hampers, in my view, judicial transformation. And there hasn't been a lot of that. And the second issue that it seems to me is very important is the view of judges vis-à-vis, the common law. Because one forgets how our Constitution recognises that power is not only situated in the state, it's also situated in private individuals and institutions regulated by ordinary law, including the common law. And all these private law arrangements and legal engagements, whether it is when you go to the cell phone company to sign a contract, or whether it is for a myriad of any other contracts, or when one is harmed in delict, or whatever. Judges should understand that the Constitution actually requires a judge to develop the common law, to bring it in line with the values of the Bill of Rights. And there's a lot of resistance to that among the more conservative judges – and academics too, I might add!

Int Is that from the SCA (Supreme Court of Appeals)?

PDV From many judges. From the SCA (Supreme Court of Appeals), and I would say, even from the Constitutional Court.

Int Really?

PDV Yes! Although they pay lip service to the transformation of the common law and although there has been good judgments like the *Carmichele (Carmichele v Minister of Safety and Security)* case, they are a bit nervous to upset the perceived certainty of the common law. There's now a case end of last year, I can't remember, the Blue Moon trading (means Blue Moonlight case - (*City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another*) was it, and they said, ja, we have to think more about how we think about these terms. There are terms in a contract that are unjust or whatever. But they are very hesitant, they are very scared to go there, quote unquote, because I think they fear that there will be unforeseen consequences, that it would unsettle the law and that the legal certainty that is purportedly at the heart of the capitalist system is going to be undermined. And so there's some hesitancy to really think about these things differently. And I think the judges are a little bit worried it will have unforeseen consequences.



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

PDV Well, I don't know... I guess then it was about establishing a constitutional state, and ensuring the acceptance of this radical notion of judicial review. So there were lots of challenges about how to interpret the Constitution, how to try and make this happen and to start thinking differently about doing law, to transform the way we construct legal arguments. Because South African legal culture is very conservative, and if you have a Bill of Rights and a Constitution that is supreme than you have to think differently and argue differently about law and about how to interpret the text of the Constitution. The very formalistic approach to legal interpretation is not going to be very helpful when dealing with the kind of Constitutional text we have. That's a big challenge. I don't know if that's been met yet completely. And...ja...there was the whole thing of the adoption of the final Constitution, which is, some people would say quite a bizarre thing that we did, by having a Constitutional Court declare unconstitutional a Constitution adopted by the Constitutional Assembly (*laughs*).

Int You mean the Interim Constitution?

PDV No, the requirement that the thirty-four principles contained in the Interim Constitution had to be reflected in the final Constitution, meant that the Constitutional Court in the certification case had to test to see if this was indeed so. And in that judgment the Court said, no, the final Constitution is not complying with those thirty-four principles, which was negotiated by a completely undemocratic negotiating forum and therefore the final Constitution was unconstitutional and had to be fixed by the Constitutional Assembly before it could be ratified by the Court. And that was an interesting...I think that was quite a challenge for the Court to do that, it was very difficult, I think, because how do you do that when the text was now negotiated by all the parties, everybody agreed to it, except there were like how many, three abstentions, or whatever, or five abstentions; everybody voted for this Constitution and now you declare it unconstitutional. So it was quite an astonishing role the Court played there. And it is interesting to see what issues they picked which required further amendment to bring them in line with the 34 principles. Some things like the amendment procedure had to be beefed up, and so on. And other things they didn't go for, so they did not agree with the argument that the Judicial Service Commission had to have less politicians on it. Maybe they're regretting it now. And then the Bill of Rights jurisprudence, trying to establish a whole jurisprudence on equality and all these things, I think it was quite a task. We will look back and see, wow, that they did good, they really did well. What they didn't do well and what I think is now the challenge is, thinking about how constitutional adjudication plays out in on democracy. How a decision of the Constitutional Court can

either strengthen democratic processes and the democratic ethos, or weaken it. I think they didn't realise at first how important the Court's role was in safeguarding the democratic process and they had quite a narrow understanding of what democracy required. Maybe because of a fear of being seen to interfere with the elected branch of government, the Court in the first ten or fifteen years, weren't really very strong on issues of safeguarding the democratic process...they were very deferential when it came to anything to do with democracy. So the ID book case, called the *New National Party (New National Party v Government of the Republic of South Africa and Others)* case, about the ID book requirement law which stated you could only register to vote with a green ID book, they did not rule against that provision although it disenfranchised a lot of voters at the time. I don't think they saw their role as the guardians of the democratic process. Back then there was not that realisation, which is maybe now emerging in South Africa, which is always the case in a one party dominant system, sort of anxieties about democracy and about how can the democracy be strengthened and protected by the Court. Now suddenly they are starting to do these things, like this meaningful engagement concept, I think is a very interesting, as I wrote, it's a very interesting mechanism to try and use socio-economic rights to actually think about, or enhancing the democratic interaction between the elected representatives and the people who are supposed to be served by the elected representatives. But that's a challenge. There are many other things, you know. A very difficult issue that goes to the heart of separation of powers issues is the question of how far the Court can go to force Parliament to do or not to do certain things in the way it operates, the line of cases about public involvement in the law making process, is a case in point. The *Doctors For Life (Doctors for Life International v Speaker of The National Assembly and Others)* case, and then the various *Matatiele (Matatiele Municipality and Others v President of the Republic of South Africa and Others)* cases, in which they had to grapple with this because they want to give effect to that but it's a formalistic kind of thing. As long as you follow the process and you actually meaningfully engage then that's the end of the story. So ja, I think they are grappling with it now.

Int How do you define 'meaningful engagement'?

PDV Well, the Court has a whole...in the socio-economic rights field, the meaningful engagement, they have a whole set of factors that must be taken into account. That there must be...the parties must act in a bona fide manner, they have in that *Olivia Road (Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others)* case they said something like the officials must be competent and compassionate, or words to that effect, at least.

Int How do you operationalize compassion?

PDV You see, it's very difficult. It reminds me of the words of Albie Sachs in the Port Elizabeth municipality (*Port Elizabeth Municipality v Various Occupiers*) judgment where he said the law must be infused with grace and compassion. It's a bit of an amorphous thing, and it sounds in a way very unlawful, because it is not easy to pin down, this meaningful engagement. It is a bit like what that American judge said about pornography, it's difficult to define, and I cannot define it, but I know it when I see it, kind of thing (*laughs*). If I explain it to students I say, it is about the duty of the government, or the municipality or the whatever, to SEE the people with whom they are interacting. To recognise their existence and to treat them with dignity. To respect them as individual people and to take their concerns seriously. It requires the municipality or provincial or national government to say: We are not coming here technocratically from the outside and telling you what is best for you. We see you, we recognise you as human beings with inherent dignity. And we are going to interact with you in that spirit, as the government, as people with respect for others. That's how I conceptualise it. But they chop and change also the factors that they take into account, but ja...

Int At what point, Pierre, did your blog "*Constitutionally Speaking*" start, and what have been some of the challenges of starting a blog in South Africa?

PDV (*laughs*) Well, it started about four years ago. And in the beginning...I was a bit bored actually. And I started writing this blog and in the beginning I just put funny things on it, sometimes nothing to do with constitution law.

Int You could have done a blog about baking or cooking but you did a blog about Constitutional Law?

PDV But the reason why I started that blog, Dennis Davis is to blame for it, because we went to dinner once with a colleague from Israel, a friend of mine who has also written on socio-economic rights and sexual orientation and the law and so on. And he was visiting, and he knew Dennis (Davis), and we went to dinner, and Dennis said, "you bloody academics, you sit there in your ivory tower and you don't speak out on the issues of the day, and you don't engage with what is going on in South Africa properly, and you have all the power and freedom to do so, because nobody is going to fire you from your job because you are a bit controversial. And how can you build democracy if academics don't take part in the discussion?" And so the combination of me being a little bit bored, and Dennis (Davis) saying this, so I thought, oh, then I'll start a blog and the blog will be a way of interacting. So that's how it started. Now it's been snowballing a bit. And there are two main challenges. The one is time. It takes a hell of a lot of time. I'm stressed. It's like too much...it takes a lot of time, especially if you want to do it well. And now that I know that people actually read it,

Int Which they do...

PDV Yeah, a surprising number of people read it. I know many judges read it. So, I get nervous about what I put out there and I have to really study the topic and do it properly, so it takes a lot of my time. The second challenge is, it's not always easy to respond immediately, as I often do, and to get it right. Sometimes I have not always been good at getting the tone right. I have erred sometimes in being too personal and too sharp which detracts from what I have to say. And you have to entertain and you have to inform. And you can't be too over the top, because then you stop informing and you just make people cross. But if you are just going to write in a dry way, then, you know, people are not going to read it or really want to read it.

Int How do you know the judges are reading it?

PDV I've been told (*laughs*). A friend of mine was arguing before the Constitutional Court and he said, yes, this judgment has been criticised by academics, and one of the judges, apparently (Mogoeng) Mogoeng said, "you don't mean Professor de Vos on his blog?" (*laughs*) I once corrected something the Constitutional Court did, because they referred to the wrong section of the Constitution in a judgment.

Int Really? Which one was this?

PDV I still have a letter here somewhere that they then sent...so and then they sent me a letter saying thank you for correcting it, and it's now been corrected. It was to do with the powers of the provincial versus national government and when can you intervene (*Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another*). And they referred to the wrong section. So I assume that (*laughs*) some of them at least read it.

Int Good for you. Pierre, what are some of your concerns about the independence of the Court?

PDV You see, independence is a funny word. Because what is independent? Who are you independent from? Usually when people say independent, the chattering classes mean independent from the government or the governing party. But you can also not be independent from big business, or from the opposition...

Int I think I'm really meaning independence from the government.

PDV Ja. From the government, I don't have a fear that there will be a direct interference with the independence of the courts, because the government needs the courts for the system to work. It's the escape valve in a way, and it's important that people feel they can appeal to independent courts. No, I think there are enough people in the ANC who believe in the constitutional project. Maybe I'm naïve. Some people will say I'm naïve. But I think they do. The problem is, if you read the political science literature on one party dominant democracy, is one of "capture", where slowly but surely, through appointments, the bench is made more compliant. This is possible because the JSC is dominated by ANC aligned people. And if they really want to and they're really cold-blooded about it, they can appoint more and more people who are really executive minded and not capable of being impartial as far as the ANC-led government is concerned. And you know, in South Africa, because everything is about race, an appeal to racial solidarity can work in favour of keeping judges in line in terms of remaining executive minded...because of course we all know that once judges are appointed, as somebody once said, they might think that they are there on merit and they start thinking for themselves. But the process of appointment is a difficult thing because you want there to be some political input because the judges have a lot of power and politics must play some role. It would be untenable to have a bench stuffed with deeply conservative white men, for example. But you don't want one political party to decide who is on the courts. So it can feel as if one is between a rock and a hard place. And at the moment the JSC is not operating, I think, as well as it should. It sometimes gets criticised wrongly, I think, when it doesn't appoint some judges who are not progressive. You know, somebody like Jeremy Gauntlett, who is a good advocate but he's a deeply conservative person. I don't want him to be on our Court. But they were very criticised for this. But other times I think they just appoint the wrong people and appear to appoint mediocre people...I'm not sure if they appoint those people because they think those people are going to be less critical.

Int You've written these series of wonderful articles in the Guardian, and you speak there about South Africa's having an innovative and transformative justice, and I wondered whether you could talk a bit about your understanding and what you'd like others to understand about South Africa's and the way in which it's been approached?

PDV Okay...of course I've now have already forgotten what I wrote in the Guardian (*laughs*). But transformative constitutionalism, that phrase was first coined by Karl Klare in that article in the South African Journal of Human Rights in 1998. And it's really a broad concept. It's about the notion that the Bill of Rights, especially, can be used to effect social change and can be used to help transform the legal culture and the legal rules themselves. So it's for me about two things, about the horizontal application of the Bill of Rights and the notion that the Bill of Rights cannot just be invoked against the government, the state, but also against third parties. And can also be used to transform the common law and so on. And then the other aspect of the transformative

nature of the Constitution that I think is important is, it's a recognition that where we're coming from, a system that created these vast inequalities in opportunity, in everything, between rich and poor, mostly racially based, and that something needs to be done to address that. So transformative in that sense means the constitution understands there is a need for social and economic redistribution and that the law should not hinder this process. And making judgments that is going to help the government to effect social justice, that is not going to hinder the government in addressing this huge mostly racialised, also genderised, inequality in our society.

Int Interesting. I'm curious about your novel. What is the impetus and the fantasy behind that?

PDV *(laughs)* Oh dear. Well, I sometimes just sit in front of the computer and write stuff. I wrote this long ago. But this was actually, this was a serious thing, the novel was very profound for me because it was a way coming to terms with being a white Afrikaans person who supported apartheid. So the whole story of the novel was about this son whose father was in the police hit squads and went off to kill opponents of apartheid, and how the son tries to come to terms with it. In the end he betrays his father by giving all his father's files of what he did to the Truth Commission. So at the time I wrote it, it was therapeutic, but I also thought, rather naively, oh, I'm going to be a famous novelist forever after. Of course it didn't sell as many copies as Stieg Larsson unfortunately *(laughs)*. But I spoke to Afrikaans white people, and it was like trying to make people think about how complicated our past is and how we can't just close the door on it. It's not as if things just change overnight and we are all suddenly different people. We carry that thing on our back, and recognising it is the first step to being free.

Int It sounds to me so complicated that the Constitution is being made to deal both with the past and a transitional present, and with the future...

PDV *(laughs)* But you see I think it is not so...I think it makes a lot of sense. Because what the judges often say, they say that the Constitution is about preventing the past from happening again, but also preventing the lingering effects of the past from being fossilized from being fixed forever. So it's all about...in a way it's all about the past. And it's all about how...so it's also all about how we conceptualise the past, because depending on how you conceptualise it, if it's very narrow then your vision for the future is going to be very narrow. So it seems to me it's very...it makes a lot of sense that you think, let's think where we're coming from, because we want to know that is where we're coming from, we want to avoid that, we want to get away from that...you know, the metaphor of the bridge that was in the Interim Constitution. And we want to move somewhere else. The only difference I have is I don't think that bridge ever gets to the other side of the river, it's just

a bridge that goes off into forever after. And you always look back and you see where are we coming from. Ja, I know that was not very coherent but...

Int No, I understand perfectly.

What are your fears and concerns for the future of the Constitutional Court and the public life of South Africa?

PDV For the Constitutional Court I fear that it will become more conservative, firstly.

Int Really?

PDV Yes. And that it will become less intellectually diligent. This is a naughty thing to say but I'll say it nevertheless. You know, it's a wonderful thing, and this is for selfish reasons because if there's a really interesting intellectually stimulating work coming out of the Constitutional Court, it makes my life interesting. But also because this has effects on the legal culture in general and the way law is done and the power of the law to actually change things and so on. So if the Court becomes less persuasive and respected intellectually, it will be more difficult for it to have the influence that it can have. So I'm a little bit...I'm nervous about that because I think there is a tendency on the part of politicians to appoint the people that they don't feel threatened by, and it's not about whether you agree with me or not but people want to appoint people that they don't feel threatened by and people are often threatened by other people who are more clever than they are (*laughs*). So it's that...there's something there. And maybe also where we're coming from because some of those...you know, like Langa, and Chaskalson and Sachs, and so on, they were such towering intellectual figures with such interesting ideas, so it just...it's like the whole vibe of the Court...

Int But isn't that a concern that the first Bench will always be regarded as this glory bench, and that nothing will compare to it?

PDV Yes, because it was a special inaudible. And that's why I tinge that with a little bit of what I think now is a little bit of realism, of, yes, we were a little bit starry-eyed about the Court and what it can and cannot do and so on. But it was a special Court so it was a special time. Just as people will always think of Nelson Mandela, he regardless he made mistakes and whatever, but people will always...we will always romanticize him. so it's the same thing with the Court.

Int That's interesting. If you had talk to a group of students abroad about the Constitutional Court, what would you say?

PDV I would say that it's worth studying the judgments of the Constitutional Court, and that it is...and there are two reasons for this, the one is that the text of the Constitution made it quite easy or easier for the judges to hand down judgments that are really ground-breaking and interesting, on many levels. Whether it's about equality, sexual orientation, and other kinds of equality law, socio-economic rights, the death penalty, the freedom of expression, all these kind of things, they have really grappled with the issues in interesting ways, sometimes using social science knowledge and being a little bit more interdisciplinary but the text helped them to do that. But the judges themselves also played a big role, I think, in the way in which they...the mixture, because there is a mixture of judges on the Court, in the first fifteen years. From very studious, quite on the face of it formalist kind of judges like our Laurie Ackermann and Goldstone and so on, and then...(*interruption*) and although the judges themselves, I think, because they came from different backgrounds, intellectually, racially, whatever, but because they worked so closely together and they were so collegial, I think there was...something happened there. There was a...it's a bit of a romanticization and I know and I acknowledge it, but I think there a little bit of magic sometimes happened between say, a Laurie Ackermann who's fastidious and wants to cross every t and dot every i and everything has to have seventeen footnotes, and an Albie Sachs who wants to read Foucault and Martha Minnow and think a little bit more about the broader conceptualisation of the issues and so on. And between those two kind of strands, something, sometimes, in some of the cases, happened that is really beautiful. So it's almost like poetry (*laughs*). And you can criticise the Court for many of the judgments but you can never say that they didn't do interesting judgments and that it's not worth reading those judgments.

Int Thank you so much, Pierre. Is there anything I've neglected to ask you that you'd like to include in your oral history?

PDV No, I think I've been speaking far too much already so...(*laughs*)

Int Thank you.



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