

# A life in human rights: a conversation with Dennis Davis

Tor Krever\*

Dennis Davis is Judge of the High Court of South Africa, Judge President of the Competition Appeal Court, and Honorary Professor of Law at the University of Cape Town. In this wide-ranging conversation with Tor Krever, he reflects on his political and intellectual trajectory—from early encounters with Marx to anti-apartheid activism to a leading position in the South African judiciary—and his lifelong commitment to a radical left politics.

*TK: You grew up in Cape Town, South Africa in the 1950s under apartheid. Were your politics shaped already in childhood?*

DD: I knew from a very early age that apartheid was an evil system, but one's parents tended to be protective: somehow they felt the need to smooth out the narrative so that kids were almost immune. At least my parents and many like mine—middle-class Jewish parents—were troubled enough to feel that they didn't want to impose upon their kids the burden of living in an apartheid society. But of course you couldn't help but notice it. I remember going from school to my mother's office in town when I was about nine or ten years old and seeing the police beating up a whole group of young black people who didn't have passes. I remember, in that pathetic way when you're nine or ten years old, saying: 'you know, I need to be the Prime Minister so I can stop this sort of thing from happening'.

By and large, though, these were very episodic moments in a life that was very middle class, very privileged. Although, and this is the important point for me, I came from an unusual background because we were, I suppose, actually working-class Jews. What does that mean? The vast majority of Jews in South Africa, of which there were 120,000 at their height, were upper-middle class and making good money. They were essentially lawyers, accountants, doctors, and entrepreneurs. My father by contrast was a motor mechanic, and

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my mother was a secretary. It was extremely unusual for Jewish kids to grow up like that. I remember very distinctly being aware of this at an early age. For example, my school had parent-teacher meetings at which my parents would have to go to listen to what the teachers had to say about me. My father came home in his overalls, and my mother was getting very anxious about having to get to the meeting. I remember my father saying very pointedly ‘unlike the other parents who are in suits all day, I have to scrub up’. There was that sense that I was different.

*What about at school? Were you influenced by any of your teachers?*

The best thing that ever happened to us in school was in 1965 when I was 13 years old. We had a very good teacher who spent a whole year in our English course dealing with *Cry, the Beloved Country*.<sup>1</sup> Now, I know it’s liberal, but he posed it really as a political book, and for the first time I think there was a much more coherent discussion of politics that started. Then, a couple of years later, I landed up in the Jewish socialist movement Habonim. Who should be my group leader? None other than John Comaroff, the great social anthropologist. He was about 20, probably a young student at university, and I was 14, and he taught us Marx. That was the first time I was ever introduced to Marx.

*Was Judaism important in shaping your early attitudes?*

In the immediate sense, yes: it seemed to me as a child growing up that Jewish history certainly informed the idea that all forms of discrimination of any kind are absolutely reprehensible. And as one went on, it became clear that a notion of citizenship that was linked to nationalism was utterly a contradiction in terms.

I went to a Jewish school—that’s where my parents sent me—and that school completely shaped my vision. It took me years to realise that the rubbish I had been taught was not true. The traditional Zionist idea of a land without a people for a people without a land was drummed into us. I did not know about Deir Yassin until I was 18 years old. Can you imagine that? I had been to Israel—I went in 1966—and I had read stuff, but I didn’t know. The first time I heard of it was only when I debated the Israel-Palestine issue supporting, much to my chagrin and embarrassment, an establishment position as a naïve 18-year-old, and my opponent cited Deir Yassin. I had no idea what he was talking about, and I went and read some old text, and I was absolutely amazed to realise that I had been cheated, that I had not been told the truth. It was shocking.

1 Alan Paton, *Cry, the Beloved Country* (Jonathan Cape 1948).

I believed that Jews should stand up against apartheid, and they should be at the forefront of the struggle. And indeed they were, but not Jews in the active community, only Jews like Joe Slovo and Albie Sachs and Ruth First. As time went on my focus became much more the idea that the Jewish community must stop supporting the state of Israel. What they've done is to support an utterly pernicious system that has oppressed Palestinians, and they should know better. So now my entire task when I engage with them is to destabilise their assumptions.

*After school, you went to the University of Cape Town to study law.*

Yes, and you must understand I went to university in 1970: this is at the height of apartheid and also the height of the National Party's hegemonic project. Until 1958, the National Party didn't even have a majority of whites on their side, but then in 1966 and 1970 they won enormous victories amongst the white population. Those elections gave them enormous confidence that both the English- and Afrikaans-speaking white people were behind the National Party and behind the National Party's project. Politics was dead. The ANC had been crushed, and there was very little resistance. The first glimmers of resistance occurred in 1973, around the time of the collapse of the Portuguese empire in Angola and Mozambique, with the strike action by textile workers in the Philip Frame factories. But that wasn't until my third or fourth year of university. Law school was a pretty black-letter institution, and my law degree was a very hollowed out, black letter law programme without any politics. Some of the professors had been members of the Liberal Party, but they were exhausted. Whatever contribution they had made outside of the course curriculum, they had given it up.

*Nonetheless, it was during law school that you became radicalised.*

Yes, my first big influence was as an 18-year-old kid. There was a meeting on the campus between the Black Consciousness people—Steve Biko and his group—and the white liberals. Hearing Biko talk, I began to realise that he was right, that we whites did purport to speak for blacks and that that was completely wrong—and that there was another paradigm out there other than our colonising, liberal project. Listening to Biko had a huge impact upon me. It was only latent because I wasn't quite sure how to absorb it into some theoretical context, but there's no doubt that it was a massive influence on my life.

The turning point for me then came in 1972. We were protesting about detention without trial. In those days we had positions that were ridiculous, like charge or release: charge detainees under apartheid law or release them, but don't detain them without trial—a very liberal framing. But in '72, the cops for the first time actually started beating up white students. We used to

protest a lot at the Cathedral in Cape Town, and on one occasion they beat up a whole lot of us. I remember running down Queen Victoria Street with cops chasing me with batons—the very street on which the court where I now work is located.

That was the beginning of change for me. It was at that point in time that I started to realise that the liberal position—simply that there was some endemic racism in the society, and ultimately some liberal project would emancipate us from that—was complete rubbish. The reason, I think was, twofold. First, I started to see just how oppressive it all was and how ridiculous the framing of the debates were. And second, I began to read new critiques. Harold Wolpe and Martin Legassick, two South Africans who had left the country and were in English academic life—Legassick at Warwick and Walpe at Essex—wrote classic pieces in the '70s suggesting that the entire South African economic apparatus had to be framed in class terms. The National Party wasn't just racist; it was trying to control the black masses in order that the white capitalist project could be perpetuated: the turn to greater authoritarianism could only be explained in that light.<sup>2</sup>

*On their analysis, the purpose of post-1948 apartheid was primarily the maintenance of cheap labour for industry. Wolpe, for instance, argued that apartheid could be best understood as a mechanism for maintaining a high rate of capitalist exploitation through a system that guaranteed a controlled, cheap labour force.*<sup>3</sup>

Yes, and they were the first people to argue this. Their work was circulated amongst various progressive students, and we started reading it in reading groups. Bizarrely, none of it was banned because it was published in academic journals, so in a sense it went under the radar. But it was very influential for me: by the time I got to the final year of my law degree, which was in 1975, I was absolutely convinced that the liberal narrative had absolutely nowhere to go.

*Were you involved in any political organising outside of the law school?*

I worked for the Workers Advice Bureau where union organisers would get law students and young lawyers to give advice to workers. We'd go out on Saturday mornings into the township and try to deal with all the workers' problems. This

2 See, e.g., Harold Wolpe, 'Capitalism and Cheap Labour Power in South Africa: From Segregation to Apartheid' (1972) 1 *Economy and Society* 425; Martin Legassick, 'Legislation, Ideology and Economy in Post-1948 South Africa' (1974) 1 *Journal of Southern African Studies* 5; Martin Legassick and Harold Wolpe, 'The Bantustans and Capital Accumulation in South Africa' (1976) 3 *Review of African Political Economy* 87.

3 Wolpe (1972).

was really conscientising because now I was actually getting to see real live workers. You have to bear in mind that in South Africa at this time white people never saw black people other than as domestic help in their own houses, so that was a hell of a conscientising thing. This was around '74-'75, after the strikes at the Frame factories and the rise of the trade union movement.

*Did you practice law after graduating?*

I wanted to go overseas, but because I had now become quite a shit-stirrer at the law school, even though I was second in my class, I got not a cent of scholarship or bursary money. So I went and worked at the Old Mutual Insurance Company because they paid well, and I could save enough money to then go study overseas. What area was I lumped into about which I knew absolutely nothing? Tax. And here's the serendipitous thing. A year and a half later, there was a revolt in my law school because the teaching was so appalling that the students demanded a mass meeting with the dean, and they said to the dean: 'why is it that we have all these plonkers who are teaching in our law school? Why can't we have some of the younger folk who have just graduated? Why can't you start using some of them?' And so bizarrely, because they needed a tax person, I was invited back into the law school to take up a post teaching insurance law and tax law.

*Had you thought about going into academia before this?*

Well, it was really only after the Soweto uprisings of '76 that I became determined to go into academic life. I was sitting at the Old Mutual because I needed money to go overseas when the Soweto uprisings began. Now in 1976, if you're a white kid and you are committed to a left political project, there were limited outlets. There were no public interest law firms. The union movement was only beginning—there were the odd white guys in the unions, but it was quite difficult to get involved. So the only other terrain where politics could play out for a white kid was in the universities. I remember thinking in '76: I've got to get out of here. So when I got the offer to teach in '77 it was fantastic.

*Tax and insurance law presumably were not central to your political interests at this time.*

No, I was much more interested in labour law and legal theory. The legal theory guy was a positivist, an Austrian—he really believed in Kelsen in a passionate way. But he was a nice man; he'd been my teacher, and for some reason he liked me. He said to me 'I can't stand teaching anything other than Kelsen and Hart. Will you do the rest?' So I landed up in 1978 teaching natural law and moving into some versions of Marxism in a legal theory course. It was

completely serendipitous because they hadn't hired me for that. And of course I was dutifully teaching my usual stuff as well.

*Was Marxism by now influencing your own approach to law?*

Well, it is true that if I look back, I was grappling with the question of how I would apply a Marxist paradigm to my legal teaching. I wasn't doing a hell of a good job. There was nothing out there other than very instrumentalist Marxist texts. Pashukanis was probably the most sophisticated of these.

My students were hugely influential. Nicholas Haysom, who became Mandela's legal advisor in 1994, was my student in '78. He was a real radical guy, an impressive person, and we had a reading group. He was much better read than I was. We were reading Poulantzas, Pashukanis, Marx proper—*Capital* volume 1 to start off with.

*In the end you did make it overseas.*

The university had given me a deal. They regretted it thereafter, but at that time they still liked me. I got a full sabbatical without having been there for more than about two years. So off I went in 1979 to Cambridge where I studied criminology. Why? Because I had always had the sense that I was interested in psychiatry, and it was still partly there. Criminology offered a chance to combine that with the law. I was incredibly fortunate because I arrived at the tail end of the Marxist period in England, at a time when people like Stuart Hall were writing *Policing the Crisis*.<sup>4</sup>

*Marxism was particularly influential in criminology at that time.*

Enormously so. There were all those people, like Stan Cohen, who had moved from Deviance Theory into Marxism. And then of course there were all the historians, like Edward Thompson and Douglas Hay, who came to talk to us in our criminology Master's programme. That was quite something. *Whigs and Hunters* becomes a very important text for me, enormously important, because more than any other, it's the text which poses the question of the dialectic of law: the constraining and the emancipatory components of law.<sup>5</sup> It was really the text that, theoretically, influenced a whole generation of us and made us realise that we should be exploiting spaces in the law—in the Labour Relations Act, for example—and that even if the law was designed to constrain us, it could still constrain the government too.

4 Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State and Law and Order* (Macmillan 1978).

5 EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane 1975).

At Cambridge, I was also taught by Colin Sumner. He had been a working-class lad from Manchester who had gone to teach at Aberystwyth, got his PhD, which was a Marxist text called *Reading Ideologies*,<sup>6</sup> and then got a job at Cambridge. I became very close to him: he was my supervisor for my Master's thesis, and he was really very good. He taught us essentially two courses: one was a kind of Marxist theory of deviance, and the second was a methodology course which was fabulous. It was a serious politics of method where we were vigorously engaged in what a radical epistemology meant.

*Did you connect with any of the South Africans in exile while in England? Wolpe or Legassick, for instance?*

Yes, I had quite a long relationship with Harold Wolpe. He had been arrested at Rivonia,<sup>7</sup> but he and Arthur Goldreich, who owned the house in Rivonia, managed to bribe a guard and escape from jail and so never stood trial with Mandela, Walter Sisulu, Govan Mbeki, Denis Goldberg, and the others. They managed to get out of the country, and Wolpe landed up in Essex. I had read his pieces as a student, and I met him for the first time when I went to Cambridge. We formed a pretty good relationship and saw each other quite a lot. He had a place near the university, and I went down two or three times and had long conversations with him about politics and academic boycotts.

It wasn't just the South Africans I met while in England though. I met Robert Fine, who was at Warwick, but we ended up at a conference together. He was part of a group who put together a collection called *Capitalism and the Rule of Law*, a classic text.<sup>8</sup> We became close friends and later we started to collaborate. I also started to meet other people whom I had been reading. They were very helpful, so for example I went to see Alan Hunt at Middlesex Polytechnic and said 'Alan, can you give me your syllabi for legal theory?', and of course all this Marxist stuff came back.

*You returned to South Africa in 1980. Had much changed?*

I came back in the second half of '80 to carry on teaching. By the time I got back to South Africa, I was pretty committed to a Marxist viewpoint. But it was no longer the crude instrumentalist one, because I'd now encountered a whole panoply of things from Stuart Hall's *Policing the Crisis* to Edward

6 Colin Sumner, *Reading Ideologies* (Academic Press 1979).

7 On 11 July 1963, 19 ANC leaders were arrested at Liliesleaf Farm in Rivonia, a suburb of Johannesburg.

8 Bob Fine, Richard Kinsey, John Lea, Sol Picciotto and Jock Young, *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (Hutchinson 1979).

Thompson's *Whigs and Hunters* to Colin Sumner's *Reading Ideologies* and everything in between. I had already seen my world very much in class terms, but my time in Cambridge reinforced this. It's one of the reasons, oddly enough, why I think academic boycotts, in a non-nuanced way, can be counterproductive. If you said to somebody like me 'no, you can't go overseas because you're a white South African', I think I would have been a lot less intellectually, and therefore politically, confident about my position. It was because I had gone to Cambridge and heard people like Stuart Hall and Edward Thompson and Raymond Williams—extraordinary giants in their fields—that it became clear to me that there was a whole community out there framing the discussion in ways which were not hugely dissimilar from what I was trying to do in my own way. You must understand, it was a lonely intellectual period, because from the time I got back in '80 until about '85 there were few other Marxist legal academics in South Africa. Raymond Suttner was the only other one.

When I look now at the articles I published when I got back, I must have been mad: this was the height of the authoritarian government, where they're locking people up, and I'm writing articles on Marxism when there's a thing called the Suppression of Communism Act, which is supposed to ban people who espouse any kind of Marxist vision. And what is funny is people were publishing them. That was even more bizarre: that right-wing, conservative editors of law journals thought it was okay to publish academic articles of this kind, because somewhere along the line they believed in the liberal concept of academic freedom.

*These were things like your article on human rights in the South African Law Journal?*<sup>9</sup>

Well, I wrote that in '79. I argued that human rights individuated things and that structurally they were dubious.

*And also that human rights would be useless in a society structured around inequalities in the means of production—that in such a society they would likely just contribute to the preservation of an unequal system.*

Yes, it had a very instrumentalist Marxist view, influenced by Pashukanis, that actually law has no purchase at all, that it was there merely to construct and shape the capitalist system. But when I came back from Cambridge, I realised, having listened to Thompson, that actually that couldn't be right. It couldn't be right because if you looked at an authoritarian regime, when they used the

9 Dennis M Davis, 'Human Rights – A Re-examination' (1980) 97 South African Law Journal 94.



law, people were holding them accountable to that law. They had changed the bloody law to carry on oppressing, but the law had some strange quality to it, which I couldn't quite understand, but which clearly was restraining of power. And that was what Thompson was talking about.

*Your writings in the late '80s certainly reflect that change in attitude.<sup>10</sup> You were no longer sympathetic to Pashukanis?*

Of course one reads Pashukanis, and one knows there's a lot of truth in it. There's an attraction, but Thompson resonates in reality. In other words, when you're able to go to court and ensure that the trade union movement can get a stop-order facility, and this expands membership by 20 thousand, you don't need to be persuaded by the commodity-exchange theory of law to know that it's having an effect.

In the early '80s, the South African government passed a new labour law, and it did so because it wanted to protect white workers who were being undercut by black workers. Employers could pay black workers a lower wage because they were unregulated. They were unregulated and they didn't have any collective bargaining, so employers were imposing wages on them vastly below those of the organised and protected white workers. So the government thought there's a massive replacement of white workers by black workers, we better do something about this. And so what they did, which was hilarious really if you think it through, was they fashioned a new labour law which gave black workers rights.

There followed a big debate about registration. A black trade union, if it registered, was legal and could organise. The question was: did we actually want to utilise this legislation? Did you want to register and organise in an apartheid regime? There were those who said you must be mad; this is apartheid, and this is legitimation. The motivation behind the legislation was to perpetuate the interests of white workers and circumscribe the organisational powers of black workers. I was on that side initially, much to my embarrassment, as friends of mine who were on the other side remind me now very often. But it became obvious, if you asked yourself the Thompson-kind of question—the dialectical question of law—that if you registered, you could exploit the system for organisational purposes. The regime could do less to you because now you had certain legal protections you otherwise wouldn't have. That was the argument that prevailed, and it was used by the black trade union movement to develop what some called an industrial democracy within the

10 See, e.g., Dennis M Davis, 'Legality and Struggle: Towards a Non-instrumentalist View of Law' in Hugh Corder (ed), *Essays on Law and Social Practice in South Africa* (Juta 1988).

midst of a political autocracy. If you ask now who was on the right side, there is no doubt that the pro-registration people won the debate hands down.

Now, that experience made a very big difference to the way people on the left thought about law going forward. It's not surprising that as the '80s went on, people were using the law to keep activists out of detention, to prevent torture, to try to hold on even desperately to a few rudimentary liberties that could be exploited. All of that flowed directly from the earlier debate, and that was informed, certainly in my own little world, by what had happened to me in Cambridge.

*How directly were you involved in the labour movement at that time?*

It was only later that I did some cases for them in the labour court, but I was certainly giving advice and trying to see how we could use the Labour Relations Act to push trade union gains forward. And then when the emergencies began later in the '80s, I thought about how we could use the law now to attack the state of emergency and reduce, to use Carl Schmitt's term, the power of the exceptional. It was a desperate time. People were being killed in detention, so if you could get people out of detention, if you could force some form of accountability in relation to detention, you were actually saving lives, or preventing people from being tortured.

*This was when the United Democratic Front emerged as a prominent oppositional force. Did you become active in the UDF immediately?*

Well, when I first returned in 1980, that was about three years before the United Democratic Front, and it was a very bleak period because, although the union activity had begun and there were some real debates within the union movement, there wasn't a hell of a lot going on politically. There was no real major presence of the ANC in South Africa from the Rivonia trial in 1964 right into the 1980s. Indeed, in '76, if you looked at where these kids from Soweto were deriving their political sustenance, it was much more from the Pan Africanist Congress and Steve Biko. Now when one reads the history with the benefit of hindsight, one sees that the ANC had quite astutely realised they were in big trouble because these other groups were beginning really to contest their hegemonic status as the liberation movement. So there was an attempt to reposition the ANC. A lot of ANC people have served their terms of imprisonment and were back now in society and clearly wanted the UDF to be the internal wing of the ANC.

In January 1983, Allan Boesak—a very charismatic heir to Martin Luther King, since he plagiarised his speeches and adapted them to the South African context—called for a United Democratic Front of churches, civic associations,

student organisations, and other movements. It also included the trade union movement, which was now, subsequent to our exploiting the Labour Relations Act, quite large. COSATU only came a little later,<sup>11</sup> but there were lots of unions, some under the umbrella of FOSATU, the Federation of South African Trade Unions.<sup>12</sup> And there were lots of NGOs which were beginning to sprout: these ranged from the Society for the Abolition of the Death Penalty, in which I was involved, to Black Sash, a women's resistance group. There were black groups, there were white groups; there were a whole range of organisations. They held a huge meeting in 1983 in Mitchell's Plain, near Cape Town, where the UDF was officially formed.

*Some ten thousand people attended the meeting.*

Including delegates from over 500 organisations. Now, what gave them their impetus was the fight against the Tricameral Parliament. In 1983, PW Botha proposed a new constitution.<sup>13</sup> He realised that the National Party was actually quite unstable and needed to start thinking about how to co-opt non-whites. And so the first co-optation move was the Tricameral Parliament, established by the new constitution, which saw whites, Coloureds and Indians, as they called them, each have separate houses of parliament. Whites of course kept their grip on power, but suddenly these other groups had a limited political voice.

*The majority black population was still excluded.*

Right. So in 1983 there was a referendum for whites on the new constitution and Tricameral Parliament, and this gave the UDF its impetus: they were campaigning against this. That was the terrain on which the struggle now took place. And for a while the government had to allow the protest to continue because otherwise the referendum wouldn't look free and fair. So there was a short window in which all forms of organisation were able to coalesce and protest and many of us were doing that. It was shut down as soon as the referendum took place, but that brief window gave the UDF a massive impetus. Now fast-forward to '84-'85 and the UDF had become a massive organisation that held meetings to which literally thousands of people came, blacks and whites—not so many whites. There were now huge protests in the townships, many of them violent, and many of the UDF people were now being subjected to political trials. There was series of extraordinary political trials, starting

11 The Congress of South African Trade Unions (COSATU), the largest of South Africa's trade union federations, was founded in 1985.

12 FOSATU was formed in 1979; in 1985 it dissolved into the newly formed COSATU.

13 PW Botha was Prime Minister of South Africa from 1978 to 1984 and State President—a position created under the 1983 Constitution—from 1984 to 1989.

with the famous Pietermaritzburg Treason Trial in 1984-85 where 16 UDF leaders were put on trial for treason and contravention of the Internal Security Act. There was another in Delmas in 1985-88. These were attempts by the National Party to criminalise political activity.

This is a very controversial period in South African history because there was a lot of violence. Alleged collaborators were given the 'necklace' treatment, where a tire filled with petrol was placed around a victim's chest and arms and burned. There were also very silly things, at least in retrospect, such as the call for no education before liberation, which meant that generations of black kids didn't go to school. We're paying the price for that now. So it was a very violent, very confusing period, but also a period of intense political action. And those of us who were on the left were involved very directly. We couldn't help but be involved.

*In what kind of activities were you involved?*

My project was a dual one. First, I was obviously trying to ensure my students had some theoretical lens to understand this world. And second, I tried to contribute to the struggles of the UDF. Where did academics come into that? In the main at public events: many of the leaders of the UDF were scared that if they spoke publicly the security police would arrest them. Some of us had a greater degree of protection because we were in academic life so we were doing a lot of that speaking for them.

I must have given lots and lots of protest speeches over a long period of time. I also wrote a lot. My biggest contribution was a major study in 1985, with Don Foster, on detention without trial. We interviewed almost 180 people who had been detained between 1983 and 1984 and found that 83 per cent of them claimed to have been brutally tortured while in detention.<sup>14</sup>

*You were detained yourself*

Yes, I thought I was going to have a long period of detention without trial. It only turned out to be about a week. The report, after we published it, became a major cause célèbre—it delegitimated particular trials, and it delegitimated the judiciary. We had a massive meeting in Cape Town where we called on judges to come to hear our report. Imagine. They got pissed off as all hell. Some 15 hundred people came, a thousand from the townships, but no judges. I kept saying 'where are the judges? The judges should be here!' Some of them ended up being my colleagues a number of years later. They were furious at the time: what we were in effect telling them was: 'You have to come and listen

14 Published subsequently as Don Foster, Dennis Davis and Diane Sandler, *Detention and Torture in South Africa: Psychological, Legal and Historical Studies* (David Philip 1987).

to what we're saying because you can't rely on any of the evidence the state gives you: it's all inadmissible'.

Academic life had become a place of major struggle. The police came on to the campus often. We had tear gas thrown through our lecture theatres with the police patrolling outside. They would literally be on the road outside, and you couldn't get out without their permission, and they would be throwing tear gas into the bloody room. So it was a period of huge conflict and there was a real view that they were now going to start attacking the left-wing members of the university who they knew were giving cover to the UDF. So when Don and I produced our report, we were told by the president of the university that he had information that they were going to ban us, which meant, at best, we would be restricted to our houses or otherwise charged or detained or god knows what.

We were saved, Don and I, by an extraordinary event. Wendy Orr was a young district surgeon—these are doctors that work in official medical institutions on behalf of the government. In 1985, she was fresh out of medical school and working in the medical examiner's office in Port Elizabeth. She was working in the prison and she came across file after file showing all the sequelae of brutal torture—all sorts of stuff such as electric shock treatment. She called one of my friends, Gilbert Marcus, who was a silk and Gilbert put Wendy in touch with Holton Cheadle.

*You wrote about this in some detail in your book with Michelle le Roux.<sup>15</sup>*

Yes, and the long and the short of it was that Wendy and Holton actually brought proceedings against the police to obtain a court order protecting detainees from police assault—to restrain them from torturing people. But what they'd done now was expose officially, through the medical records, the extent of torture, and that got Don and I off the hook.

So in summary, that's one theme of what lawyers were doing. We were also doing a lot of investigation in cahoots with the trade union movement. Those of us who were in academic life would train trade unionists, we'd go and talk to them, we'd go and help them and do all sorts of things for them, but by and large it was the practicing, unbelievably brave practicing lawyers, who did the hard yards of using litigation to expand workers' rights. And so I was dabbling in all these areas in the '80s and it's all infused with the political perspective that I'd gained, which had been confirmed for me in Cambridge.

15 Dennis Davis and Michelle le Roux, *Precedent and Possibility: The (Ab)use of Law in South Africa* (Double Storey 2009).

*You were doing this political work for the UDF but also teaching. What were your students like?*

I had fabulous students, many of whom turned out to be wonderfully political. We also had conservative students. It was an English-language university, so it drew mainly English-speaking students rather than Afrikaans-speaking students. But there were lots of conservative English-speaking students who came to that university and deeply resented what was going on and certainly deeply resented people like me. Here's the thing, though: even the conservative ones had some sense of politics. When a tear gas canister is thrown into your lecture theatre, or the police come onto the campus and brutally beat your fellow students, even if you don't like those students, you have sufficient sense to understand there's a crisis out there, and you are no longer 100 per cent certain that these racist and authoritarian views, these shibboleths, are necessarily going to hold firm.

Bluntly put, I think if you do your job as a teacher, meaning you really do your job as well as you can, it's amazing how much generosity you will find from students who are ideologically different from you. If you're crap, they're going to be really harsh. But if you say 'I am going to teach you what the field is, but I'm also going to teach you a lens to look at that field, which you don't have to accept', then I think at least in those days they were receptive.

*And the faculty?*

Oh, the faculty deeply resented the sort of stuff I was doing. They certainly weren't going to promote me. But it was a bit difficult for them because I had won the distinguished teacher's award, which was a university award given for the best teaching, in my second year. Funny enough, I should have won it the first year, but I didn't because the faculty wrote such a nasty report about me. In those days the deal was that you could only be put up once, but there was such a huge furore about it—I didn't know this until many years later—that they then changed the rules saying people could actually be considered a second time, and I got it the next year. I was then turned down for a full chair on three separate occasions. On the last occasion, I had refused to apply. I was called in to see the dean who said 'You've been turned down', and I said 'I didn't apply', and he said 'Oh, well we considered you anyway'.

*You went back to Cambridge briefly around this time.*

Yes, in 1984-85. My wife was doing her doctorate, and I taught there for a year. By then the Marxist period had pretty much come to its conclusion. We hadn't yet been assailed by post-modernism, but sure as hell Foucault was now making a very serious and determined bid to replace the Marxists. This

was when I started to collaborate with Robert Fine. We actually did two things together: an article and a book, both about South Africa but through a radical prism.<sup>16</sup>

*Were you engaging at all with theoretical developments on the other side of the Atlantic? This was the period when Critical Legal Studies, for instance, was emerging in the US.*

In the late '70s and early '80s, because we were Marxists, one looked at American writing with a great deal of circumspection. Frankly, if you look at social historians like Douglas Hay or Edward Thompson or Christopher Hill, they were light years ahead of the shit that was coming out of America. And then all of a sudden, around about '82 or '83, there started emerging some interesting work looking a little bit more carefully not at the macro level but at the doctrinal level—Duncan Kennedy on Blackstone's *Commentaries*,<sup>17</sup> Karl Klare on labour law and the Wagner Act<sup>18</sup>—and we started reading that very carefully. My dear friend Kate O'Regan, who was my junior colleague at the time in labour law, wrote to Karl in about '87, long before we ever met him, asking would he give us his syllabus on labour law. Back came a whole box of materials and she came down very excited, very delighted that the great man had given us all these things. And they had major application for us. So did Duncan's work, Bob Gordon's, Morty Horwitz's. And even Roberto Unger in fairness, even if it was slightly incomprehensible.

They were different from us because they weren't Marxists. They were somewhat more eclectic—infuriatingly so—but they were doing something that the Brits weren't doing: they were doing the hard yards. If you taught a course in contract, you could now use Duncan's piece on Blackstone's *Commentaries*. If you taught a course in torts, you could use Rick Abel's stuff.<sup>19</sup> And that was really valuable. So, by the mid-80s, the American Crits were known to some of us, and they became more influential as time went on. Sadly, though, they were not known to many of us. Many of my colleagues passed over them to the postmodernist, incomprehensible Derridean stuff.

16 Dennis Davis and Robert Fine, 'Political Strategies and the State: Some Historical Observations' (1985) 12 *Journal of Southern African Studies* 25; Robert Fine and Dennis Davis, *Beyond Apartheid: Labour and Liberation in South Africa* (Ravan Press 1990).

17 Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205.

18 Karl Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness' (1978) 62 *Minnesota Law Review* 265.

19 See, e.g., Richard Abel, 'A Critique of American Tort Law' (1981) 8 *British Journal of Law and Society* 199.

*In 1991, you were appointed director of the Centre for Applied Legal Studies at the University of Witwatersrand.<sup>20</sup> Was CALS already known for its progressive litigation work?*

Oh yes, they were the preeminent human rights organisation in the '80s. Halton Cheadle was there in the labour unit, which did more labour litigation than anybody else. And they did some important human rights work, a lot of research exposing all sorts of dreadful government practices—the leader of that group was Fink Haysom, my former student.

*How did you come to be appointed?*

In 1990, John Dugard was retired—I think that is probably the polite word—as the director of CALS by his junior colleagues, and they approached me to come replace him. Three years earlier, my friends at the law school at Wits, which was a very good law school at the time, had approached me to move from Cape Town to Johannesburg and apply for a chair there. I had actually applied, and the committee deadlocked because the right wing didn't want me. I'm told that if I had kept my hat in the ring, there was a second committee—a deadlock-breaking committee—and I would have got the appointment, but at the time I thought no, to hell with them, I don't need to go to a place where people don't want me. So in 1990, the younger members of CALS approached me and said 'Dugard's going, will you take over?' I went and was interviewed, and I got the job.

Dugard sort of fuffed around not wanting to go, so I only finally arrived in January 1991. In the meantime, though, about a month after my appointment, de Klerk had unbanned the ANC. So I arrived at CALS at precisely the time that we were going to fashion a new constitution. Many of the people at the Centre had connections to the ANC. Haysom was an ANC member even illegally before the unbanning; Cheadle was the preeminent labour lawyer for COSATU, and a whole group of others were all inextricably linked to political movements. I was a member of the United Democratic Front, but I joined the ANC immediately on its unbanning. They were looking for technical legal experts, so the Centre became a major contributor of constitutional thinking and drafting for the ANC: there were more members of the Centre at the negotiations than from any other organisation in the country. We were there with the ANC negotiators advising them. I was dealing with electoral law, Cheadle was working on the Bill of Rights, Haysom was coordinating the whole affair, and so on.

20 Davis's inaugural lecture at the University of Witwatersrand was published as Dennis Davis, 'Social Power and Civil Rights: Towards a New Jurisprudence for a Future South Africa' (1991) 108 *South African Law Journal* 453.



When, in the early '90s, we launched our library and called it the John Dugard library, we invited Cyril Ramaphosa, then much more radical than he is now, to give a speech and he paid tribute to all those people like Cheadle and Haysom and said: 'My career could never have been the same without these guys—these guys were crucial to me'.<sup>21</sup>

It was an extraordinarily exciting period when we were drafting the constitution. At the same time, we did this television programme called *Future Imperfect* that elucidated to the public what the constitutional implications were going to be. We had a whole hypothetical range of questions that we put to panels that represented both the right and the left, and it became a kind of household television programme that in some sense was the national form of debate on these issues.

*One of the pressing issues in the early 1990s was the inclusion of social and economic rights in the constitution, around which there was intense academic debate. Most commentators accepted the need for some recognition of social and economic rights, but there was disagreement around what form that recognition should take. Should they be fully justiciable rights or merely directive principles? People like Etienne Mureinik argued forcefully for the former,<sup>22</sup> whereas you insisted on the latter.<sup>23</sup>*

I was arguing that unless we had a proper political solution for redistribution, the social and economic rights would simply create a juristocracy—that the introduction of specific social and economic demands in a Bill of Rights would remove politics to the courtroom and place too much power in the hands of the judiciary, an institution far less accountable to the population than the legislature or executive.

*Once the constitution was adopted, CALS was involved in a lot of prominent litigation in the new Constitutional Court.*

Yes, in the early days we were there for almost every single case, from the death penalty case<sup>24</sup> onwards. If we weren't actually taking cases *pro amico*, we sure as hell were acting as *amici curiae* in a whole range of cases.

21 Ramaphosa was elected Secretary General of the ANC in 1991 and became head of the ANC's team negotiating the end of apartheid with the National Party government.

22 Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 South African Journal on Human Rights 464.

23 Dennis Davis 'The Case Against Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 South African Journal on Human Rights 475.

24 *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3.

*You were also engaging with the new Constitutional Court judges outside the Court.*

That stemmed from some of John Dugard's remarkable earlier work. In the '80s, John had the idea to organise conversations between judges, activists, human rights lawyers and academics, paid for by the Ford Foundation. He discovered a profound truth, which is that judges will go anywhere where they can get a nice hotel and a free meal. So off they came to talk about human rights questions. He would choose one or two judges who were progressive at the time, John Didcott being the most progressive, and then some of the conservative ones were also prepared to come because they liked the food—and the free booze.

In the '90s, we decided to focus on constitutional issues, so we had a number of conferences, such as one focused on whether judges should go before the Truth and Reconciliation Commission. We thought they should, but none did in the end. Then in 1993, the interim constitution was passed, and Karl Klare suggested that we organise a conference with the new judges. Under apartheid I had taken a policy of never inviting any academics to come to South Africa because I didn't want to embarrass anyone. Robert Fine was an exception, but we were old friends. Karl I obviously knew about, so immediately when the apartheid walls came down and one could confidently invite people to South Africa, I asked him to visit. He came in '93 and decided he loved the place. We were sitting around having a drink, probably too many, and he said 'I wonder what it would be like if we had one of these judges conferences where Duncan [Kennedy] came out and talked to the judges.' Huge laughter and mirth and what have you, but we actually thought 'What a great idea, we'll have a judges conference with Karl, Duncan and some other critical scholars'. In the end, Duncan, for reasons I still don't understand, couldn't come or wasn't interested in coming, so now Karl said 'We need a heavy hitter, let's try Frank Michelman—a different perspective from Duncan, but he may go down well with the judges'. And Frank said yes. We also invited Laurence Tribe, but all Tribe did was send us 50 free copies of his book. So Frank, Karl, Jerry Frug, Chuck Lawrence, Mari Matsuda, Kim Crenshaw, Elizabeth Schneider—I can't remember who else there was—came, and we had a two-day conference in February 1995 on critical issues relating to the Bill of Rights in the interim constitution. And every single one of the newly appointed Constitutional Court judges came.

As much as I had wanted Duncan, Frank was perfect. The judges were incredibly impressed that he'd been Brennan's clerk at the Supreme Court. And he gave a really interesting paper on constitutional interpretation, which was then published in the *South African Journal on Human Rights*, and it bears

reading because it's actually a very critical piece, much more so than he's been given credit for.<sup>25</sup>

*You resigned from CALS in 1998 to become a judge. Had you always wanted to join the bench?*

No, I really never wanted to be a judge. In 1996, I was an acting judge—a position where you replace a judge who's gone on leave or is ill for one term—at the Cape High Court. I did that because I thought it would be interesting to see what it's like at the other end of the bench, and at the end of it the Judge President of the Cape High Court, Gerald Friedman, asked if I wanted a permanent appointment. I was very flattered to be asked by him, and I said yes, but then had an incredibly sleepless night and went back the next day and said 'I just don't think I can do this'.

In 1997 I went on sabbatical to London and while there I got a call from the then-Chief Justice Ismail Mahomed. Mahomed was my friend and he just wouldn't take no for an answer. So in 1998 I was appointed to the High Court. I discovered later that, apart from the fact that Ismail was of course determined to push it through the Judicial Service Commission, the Minister of Justice, who was then Dullah Omar, also supported my appointment because, he said, 'I'd rather have this guy in the tent pissing out than the other way around'—that's what he apparently actually said, paraphrasing Lyndon Johnson.

*So you had a reputation.*

Oh, yes. Already in 1996, when the Judge President, Friedman, announced that professor Dennis Davis would be an acting judge, there was apparently a stunned silence from the other judges until one, who oddly enough became the Judge President after Friedman, turned around and said 'Gerald, and what is your next joke?' So no, they didn't want me there at all.

*Why?*

Because I was a radical. 'This lunatic at the university isn't a full-time practitioner. Are you mad?' I mean, they coped with one or two black people because they knew they had to have blacks on the bench, and they knew they couldn't necessarily choose who they could get. But a white lefty? That was the last straw.

25 Frank Michelman, 'A Constitutional Conversation with Professor Frank Michelman' (1995) 11 South African Journal on Human Rights 477.

*In 2000, you were then appointed as President of the Competition Appeal Court.*

When I was on sabbatical in '97 in England, I was asked whether I'd be interested in helping draft the Competition Act. I had an economics background, and I'd done some work as a tax lawyer, although I didn't know much about competition law. A whole group of us got together and, strange enough, some of the drafting took place in the Kings Cross Holiday Inn in London. Can you imagine? We were holed up there for three or four days. So the Act was drafted in '97, passed in '98 and promulgated in '99. Now they needed judges, and it was assumed by the responsible minister that I was going to have to take over as president of that court because no one else knew anything about competition law. And I've been there ever since.

*Here you are, a radical Marxist who accepts that the law can be used to progressive ends to help, say, workers, but this is no longer labour law: this is a body of law that seems quintessentially part of the reproduction of capitalism.*

It is. And certainly when one becomes a judge, one's hardly a revolutionary. So why, if you've got a left background, would you be interested in competition law? When Mandela went to Davos in '91, he was asked about the economic policy of the country, and he said it was nationalisation. You can imagine how they spluttered over their Lagavulin at Davos. So he came back and called a group of us together and said: 'Listen, this is not going to work, we're in a different world here. How the hell can we jettison nationalisation and still deal with the concentration of the South African economy?' The question was could we craft a competition law that was progressive. And if you look at our act, it's probably the most progressive in the world. It has serious public interest concerns. It does not take a consumer-welfare standard as the alpha and omega of competition law. It clearly has a whole lot of issues in it that seek to redress the past and to democratise the economy. It's not a radical thing, I accept that. But it's a very much more progressive instrument than any other country's got.

*And how do you think you've done, yourself and the court?*

Not as well as we should have.

*Why not?*

A few reasons. I don't think you have as much leverage as a judge as you think you do because pleadings and evidence do actually count if you're going to do your job properly. And I think that's had an effect. I think our legal culture, even for left-wing people, is a constraining factor. It has constrained me more

than I thought it would, probably because we were always subject to one further level of appeal. It's all well and good finding something, but if you're going to be overturned on appeal and there's no hope in hell of it being sustained, then don't bother. The other thing is the poverty of economics, which has so little by way of a progressive perspective. There are not many heterodox organisational economists around—there aren't many people who can tell you that you can have a total-welfare standard as opposed to a consumer-welfare standard, which would filter the evidence in a particular way, and it's bloody hard as a judge to do that without that assistance. So we've been deterred on that front too.

*Has much has changed in the legal academy since apartheid—since the black-letter education of your student days?*

One of the things that Karl Klare wrote about back in 1998 in his celebrated article on transformation and the constitution was the culture of legal education. He argued that a conservative culture of law and legal education would retard even a modest social democratic vision.<sup>26</sup> He has been proved correct. I have watched with growing alarm how my own law school, the University of Cape Town—where, other than my seven years at CALS, I've taught my whole career—has done precisely what Karl predicted would happen. There is a complete failure of political imagination and there is a complete failure of intellectual imagination—a complete resistance to any alternative legal culture to that which existed during apartheid. That doesn't mean that these people are racist. What it means is they think if you purge apartheid out of the system, the system is inherently good. It's a form of positivism completely unhinged from any normative vision. The chief protagonist for this kind of idea is one of Joseph Raz's ex-students, Anton Fagan. He was also a student of mine and is now a colleague.

*You've engaged in an extended debate with Fagan in recent years.*

Yes, what Fagan has argued is that you can't use the constitution to get at private law. Private law is sacrosanct and there is no reason to change it or to change the normative framework thereof. So property and contract and torts should remain exactly as they were before. His inaugural lecture basically set that out<sup>27</sup> and I was sufficiently infuriated by it to write a response—to say

26 Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* (1998) 146.

27 Fagan's inaugural lecture at the University of Cape Town on 24 November 2009 was published as Anton Fagan, 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *South African Law Journal* 611.

that he was talking complete nonsense; that this kind of apolitical vision of law should have disappeared hundreds of years ago.<sup>28</sup> You must understand that people like Hale and Cohen are not taught—aren't known—in South African law schools. The realist position is an anathema. So I tried to put that on the agenda, an alternative. He then replied to me, and I then replied again to him, because I wasn't going to give up on this so easily.<sup>29</sup> I was interested in talking to law students, not to recalcitrant colleagues who are not going to listen to me anyway—to say here's an alternative vision of where law should be; that there is some purpose served in completely deconstructing and reconstructing the normative vision of South African private law. And what has been good is that others have now joined in the fray and said that Fagan's stuff is utterly intellectually flawed and political nonsense.

*How transformative has the constitution been? In the early '90s, you were helping draft and negotiate the document. How optimistic were you in its progressive potential?*

That's a really difficult question to answer. When I looked at the Constitutional Court that was appointed in 1994, I thought to myself 'there's some very clever people here, but I wonder if they have the intellectual imagination, the political vision, to push the boundaries'. I was concerned about that; I thought they would revert to a more traditional approach to constitutional law and be less progressive than they should be. I think on reflection I was right: they only partly pushed the boundaries. Overall, I think the early Court did well, and many people think it was one of the best courts in the world at the time—probably right, too. They were technically damned good and some of them wrote beautifully. But the fact of the matter is, if you look at it now in the cold light of day some 20 years later, the structure they created was too weak to bear not just expectations but the pressures that are now being exerted on the Court by government.

*You've been quite critical of the Court in particular for its excessive deference to the government. South African courts, you've argued, are still reluctant to engage with them to the same extent as civil and political rights.<sup>30</sup> And you've been quite*

28 Dennis M Davis, 'How Many Positivist Legal Philosophers Can be Made to Dance on the Head of a Pin? A Reply to Professor Fagan' (2012) 129 South African Law Journal 59.

29 Anton Fagan, 'A Straw Man, Three Red Herrings, and a Closet Rule-Worshipper – A Rejoinder to Davis JP' (2012) 129 South African Law Journal 788; Dennis Davis 'The Importance of Reading – A Rebutter to the Jurisprudence of Anton Fagan' (2013) 130 South African Law Journal 52.

30 Dennis M Davis, 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference lite"?' (2006) 22 South African Journal on Human Rights 301.

*critical of the balance struck by the Constitutional Court between holding the exercise of public power accountable and deference to the policy choices of government.*<sup>31</sup>

Yes, we're at a moment where in the sense they are articulated in the most positive way in the constitution, human rights are really being eroded in very frightening ways. So I'm anxious, so much so that these days, despite my scepticism, you can find me appealing to human rights—using them strategically to keep a political space open. When one argues today about a whole range of questions about utilising social and economic rights or about various components of the constitution, it's mainly fuelled from an anxiety that the state is really encroaching more and more on the boundaries of political action and I'm extremely scared about that.

*What about the constitution as a whole? If you're disappointed with the Court, how transformative was the document itself?*

Well, it could have been very transformative. Take the property clause. Yes, it's the property clause, and I wouldn't have wanted it, but the fact is the property clause is a compromise that clearly sides on the side of transformation. There's no reason why the government can't appropriate property, and it doesn't have to pay market-related values. Or take social rights. The Court may not have been as great as it should have been, but then the government hasn't delivered the way it should have. I do not see anything in the constitution which prohibits transformation, and in fact there are some damn good things that retard the attack on transformation. Labour rights: thank god we've got the right to strike and the right to organise. These are vital. I think the question of access to information has become a very vital point where government doesn't want to give, but they've got a problem. I think the substantive question of equality, which is in the constitution, and the social and economic rights means that there is a place to hold the government accountable in ways that would otherwise not be the case.

Now, has the constitution done everything it could? No. Why? Because the politics are stuffed. And one of the things we never worked out, and I don't know how you'd work it out, is if you have a government with a built-in majority of over 60 per cent, constitutionalism can protect you from its excesses, but whether it can prod that government into a more progressive line of policy—the government knows it doesn't need to do that because of its in-built majority—is pretty questionable. So no, it hasn't done everything it

31 Dennis M Davis, 'Socioeconomic Rights: Do They Deliver the Goods?' (2008) 6 *International Journal of Constitutional Law* 687.

should have but I don't think that's the fault of the text; I think it's the fault of partly the courts and much more so the complete implosion of a vibrant civil society, save for a few glorious exceptions to the contrary.

*How radical are your politics these days? Does your political horizon still extend beyond social democracy?*

Is the constitution going to be revolutionary? No, it's not going to be revolutionary. Can it be seriously social democratic in a profound way? Yes, it could be. Now, should we strive for something beyond social democracy? Maybe, but I'm not so sure it wouldn't be a bad idea to at least try to get *there*. We're not even there. I mean, hell, the lives of millions of South Africans would be a lot better if we had a really working social democracy. That's not to say that in some areas the government hasn't done well. In some areas it has. But overall it clearly hasn't.

In *State, Power and Socialism*, Poulantzas raised the profound question of how, as a progressive, you negotiate yourself between, on the one hand, social democracy that really becomes milquetoast and goes nowhere and, on the other hand, Stalinist authoritarianism where the state squeezes out all forms of democracy.<sup>32</sup> Poulantzas was grappling with that problem and it was in a sense that, the problem that we faced under apartheid, but also that we face in modern-day South Africa. You realise that on the one hand these ANC people are very authoritarian—just look at what's been going on at Marikana with the mines—but the only other thing being offered to you is some form of very watered-down social democracy.

*So is it fair to say you're generally pessimistic about South African politics?*

I'm pessimistic about a left-wing politics today, yes. I can't see anywhere where it's coming from. It may come. It may come out of the National Union of Metalworkers as they split off from COSATU.<sup>33</sup> Or it may develop because of the sheer discontent of millions at the fact that their aspirations have not been fulfilled to any significant extent. But when you look at it today, you've got to say it's hard to see where the 62 per cent majority that the ANC have could change radically. It may go down to 55 per cent, but that's about it.

32 Nicos Poulantzas, *State, Power and Socialism* (New Left Books 1978).

33 NUMSA is the biggest trade union in South Africa. It split from COSATU in November 2014.