

Justice Johann Kriegler Interview

TIME IN CODE	QUESTIONS	CONTENT	TIME OUT CODE
00:02:00:10	Where were you when president de Klerk announced that he would be unbanning political parties and releasing Nelson Mandela?		00:02:18:00
00:02:18:03		I was actually in my office in Bloemfontein, we had been anticipating something like that any day and it didn't come as a surprise but it was still an extremely welcomed announcement at the time when he made it on the 2 nd of February and the actual release was a week later, as I recall, the 11 th but the announcement in parliament of course struck like a bolt of lightning, one had not expected it that quickly since the release of some of the other security prisoners, particularly Madiba's colleagues. One had anticipated his release too not be that quick though.	00:03:17:11
00:03:18:00	When de Klerk made that announcement did you get the sense that South Africa will never be the same again and in what way did you hope the announcement would change things?		00:03:30:03
00:03:30:15		It was part of a process. It wasn't as if it came out of the blue, South Africa had been going through a process of adaptation the last couple of years of the 80s. Some of us were aware of negotiations and discussions and secret meetings that had been going on for some time, so one was waiting for the announcement but not the actual revelation of the new steps. But certainly, president de Klerk's announcement in parliament, and the way in which it was made, was an epoch-making and scene-changing announcement. It was the most dramatic of them all certainly.	00:04:24:10
00:04:24:16	Under what circumstances was the LRC founded, who were your partners and what was it		00:04:47:10

	founded for and who helped you financially?		
00:04:48:00		<p>The Legal Resources Centre came about in the late 70s. Of course, Felicia Kentridge's major effort and initiative, she had managed to raise interest and the necessary seed money in the United States for us. She, Sydney, Arthur Chaskalson and Ismail Mahomed were the founders and well, I was invited into the discussion, the spade work had been done by the time I became a trustee. I can remember particularly the people that we worked with, marvelous people, a great Southern gentleman that I have a very fond memory of, his name I can't remember ... The Legal Resources Centre's idea and the concept of looking for cracks in the granite face of apartheid, looking for weak spots, places where we could, in the executive-minded regime of the day, find little weaknesses, developed initially under the guidance of the American Human Civil Rights Movement. Jack Greenberg and those people who had done the same kind of thing over years in the Southern States of the United States of finding weaknesses, finding anomalies and finding possible opportunities for strategic litigation. So, the concept came from America but we developed it here. The choosing of the targets and weak spots or the particular painful spots of the regime were identified by Arthur and by the team that was employed in due course. It was what people like myself could do, I was not a revolutionary, I never was a revolutionary, I wasn't supportive of the ANC because I was strongly anti-communist and the alliance put me off. I could not support the struggle in that way but I could, as a lawyer, as a human rights lawyer, and as an opponent of a regime that I regarded as evil in the extreme. I also did so from a religious point of view because I regarded it as a sacrilege to deal with human beings of the apartheid regime. The Legal Resources Centre offered a vehicle for me, an outlet for my aspirations. I couldn't throw bombs and I couldn't handle an AK47, I was a lawyer and I liked to use lawyer's tools in the liberation struggle and that's the opportunity that the LRC gave us and it was a marvelous opportunity. It was followed a couple of years later by Lawyers for Human Rights which was a much more open membership</p>	00:09:22:03

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		driven organization - a much more activist organisation. We in the LRC were careful to choose strategic targets that could not possibly fail in the ultimate objective of breaking down the rigid face of the regime. Lawyers for Human Rights as I say was a much more activist, open membership driven organisation and much more popular.	
00:09:30:15	When you studied law did you know you would be pursuing human rights or was it something that happened much later on?		00:09:54:00
00:09:54:06		I came from a curious Afrikaner background of a minority thinking, opposition thinking, even in the days of Kruger my ancestors had been anti that regime, which they thought was too rigid. My grandparents drank tea with the black foreman and his wife once a year, they never drank tea with a foreman who was white. I came from that kind of background. When I went to university, I went to Pretoria University, which was as fascist of a place you could hope to have. I felt like a fish out of water. A couple of us formed the Pretoria Political Study Group to engage in debate across ideological and colour lines, which was highly unheard of and revolutionary, if not criminal in those days. I was part and parcel of that grouping that offered, for instance, the platform for Chief Luthuli in Pretoria way back in '58. So, I came to the Bar as a natural consequence of this ... which I don't know how to translate into English. I was thinking differently, a maverick if you like and I certainly went to the Bar to ... and you know the broad human rights concepts had not been developed in this country, certainly not in the circles in which I moved. I came to defend the little guy that's how I went into it, it developed into a much more ideological political concept over the years.	00:11:50:21
00:11:51:20	Is there any memorable case that you remember from the LRC days or Lawyers of Human Rights where you felt it made an impact, no matter how small		00:12:05:20

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	or big, but it made a material change in people's lives? How do you think the LRC actually shifted the landscape? what impact did it have as an organisation?		
00:12:08:10		<p>I would like to say yes but it was a long and painfully slow haul. It was two steps forward, one step back. I really can't pick a particular case that was earth shattering ...</p> <p>The Legal Resources Centre I think achieved what it set out to achieve, namely by means of strategic litigation to chip away at the corners and eventually at the very foundation of the apartheid system but it had a spinoff that had not been anticipated and a double spinoff. First of all, it alerted the administration, the fairly bureaucratic unimaginative administration to possibilities of challenge and they were shaken in their confidence in their inexorable progress - it was a salutary lesson for them, that's the one side of the bonus. The other side of the bonus, which was even more of a bonus, was that the LRC and the litigation that it propagated and drove was an example to the whole of the legal profession around the country, which meant that more bright young guys, bright young girls in the Eastern Cape, Western Cape even in Pretoria starting to think about, hey man, the regime isn't so impregnable, let's give it a bash. So, the LRC was in that way an example to many other human rights or insipient human rights lawyers in the country. I had not anticipated that it would have that effect, but it certainly did.</p>	00:14:50:01
00:14:51:05	How did you get appointed on to the IEC and what were some of the challenges in establishing the IEC and the pressures around that time because the struggle was ultimately about the vote and		00:15:25:18

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	that moment. So how did you manage that pressure?		
00:15:27:03		<p>I was actually on a holiday on the South Coast of Natal and when I came back from the beach, the housekeeper said that there had been a phone call for me from the minister. I didn't know which minister. I was told he would be phoning again at lunchtime so when the phone rang it was Danie Schutte who was the minister of Home Affairs at that time of the Nationalist Government. As he was talking to me about the electoral post, the kids were making a noise in the background and I only semi-heard what he said. I said yes and of course if the Chief Justice approves, I will do it. I thought he was offering me the post of the Chair of the Electoral Court, which would be sitting intermittently, very briefly at the time of the election, so I accepted. I said I would gladly do that and I cut short the holiday because I was told by the minister that I would have to be in Cape Town before New Year's day already, 28th or 29th of December, that was '93. I was told that I had a plane ticket. I got on to the plane and on the plane travelling to Cape Town to this meeting, I met another person who was going to the same meeting, whom I had known remotely, and he congratulated me on being the Chair of the Electoral Commission. I said no, no I am the Chair of the Electoral Court not the Commission, he said no, you've got a surprise coming to you. So that's how it came about. I accepted it under a misapprehension and in retrospect if I'd known what it was, I would still have accepted it because it's the most exciting episode ever in my life. That period felt as if I was riding a wild surfboard on a mountainous wave with rocks all around and one couldn't stop. The electoral processes worked - it worked for a number of reasons, I think it's as well to put on record why it worked. It worked because we had no option. It worked because the negotiating process, the peace committees, little meetings here, little meetings there, had been taking people along with them. There had been a slow process in which we were going through a rite of passage and the elections were one of the steps that had become inevitable in that process. The elections worked because there was accordingly a political will generally in the country</p>	00:28:53:21

		<p>for them to work and curiously and ironically and yet democratically, magnificently the opposition from boycotters and saboteurs stimulated the general public determination to go through this electoral process. While bombs were going off at what was then the Jan Smuts Airport and Bree Street in Johannesburg or when people were shot in the Ciskei or Mangope was being obstructive in Bophuthatswana and of course Buthelezi being the third obstructer, the whole dynamism developed as a result of that to create, I believe, an enthusiasm in the hearts and minds of the general electorate. We were going to have an election come hell or high water. Lastly and most importantly, there was inspired political leadership. Madiba of course is due an enormous debt of gratitude always for having the wisdom, the vision, the breadth of personality, the capacity for absorbing his enemies and embracing them and making of them allies. de Klerk's role must also be mentioned because it was not easy. There was a great deal of opposition within the National Party but the party also gave the political stimulus, leadership and inspiration. The commission did a good job and because we were amateurs, we didn't know the challenge we were facing. We only found out afterwards that it couldn't be done when we started talking to the experts during the aftermath of the election and they said you needed 18 months to 2 years to gear up for an election such as this in a country that had never ever had a general election, with an electorate, the majority which had never ever exercised the vote, without a ballot paper ever having been before them in any form or shape, without there being a voter's roll and without having been any identified polling stations. We met early in January 1994 as the first meeting of the Commission and we were told that we needn't worry, Home Affairs had identified at least 9 000 polling stations for us and we could rely on that. It was only in mid-February that we realised that 9 000 was totally useless. The number had been imaginative from the beginning and had become largely outdated, so we had to start from scratch, in mid-February, 2 months from the election, to start identifying polling stations and eventually we employed over 300 000 people. We had initially started from scratch with nobody, then the first staff members</p>	
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	<p>started on the 3rd, 4th, 5th of January and by the time the elections were held at the end of April, we had as I say, some 300 000 staff members – an enormous number for reasons that people should know. I think it's historically important, because of the justified suspicion in the minds of the liberation side to the negotiations, the PAC and ANC, that they weren't prepared to trust the department of Home Affairs or any of the homeland governments to run the elections and rightly so. At the same time, the government of the day wasn't prepared to hand over the management of the elections to some amorphous body in which it had no control, so the parties struck a deal, as they did brilliantly throughout the negotiating process. They came to a compromise. There was an electoral administration based fundamentally on staff of the department of Home Affairs, thus for instance the chief electoral officer was the Director General of Home Affairs and he brought his senior team as the administrators of the election but at the same time, and in order to keep them honest, there was a parallel monitoring division, so we actually had a double administration and that's why the numbers were so large and the cost was so large. The monitoring division and the administration division worked, conceptually, with one another but more or less like in the police or military police or in the army, the monitoring division was a monitor on its own internal administration. Both administrations had to liaise with one another, they had to understand one another, they had to cooperate, they had to trust, which caused some friction at the beginning but ultimately the model succeeded in producing credible and acceptable elections all-round. I think it should be recorded that for instance we had to mark fingers with invisible ink which is normal in transactional elections, you do mark people's fingers with ink so that they don't vote twice and it's indelible ink, it stays for several days. In our elections, because there had been boycotters and people who threatened others that if they participated in the elections, you will be killed, the ink had to be invisible but it had to be visible to polling station staff. So we had a special formula that had secretly been made in the United States which was visible under ultraviolet light so every</p>	
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		<p>polling station had to have an ultraviolet light box where the voter would put his hand from this side and from the other side and the polling station staff would look and see that it has not been marked and issue a ballot paper. Of course, we ran out of ink in several parts of the country. We produced ink rapidly because the formula had been analysed by the police forensic laboratories in Silverton and they could produce hundreds of thousands of litres of this stuff but there were many places we couldn't reach in time with the ink, for instance in Limpopo, in remote areas where communication was difficult and roads were difficult. We had panicked phone calls, what do we do we've run out of ink? Instead of just using a little brush, the staff had said stick your finger in the bottle and so they ran out of ink too soon, so we said use water, so they did, nobody came back, nobody ever found out that it wasn't ink. Places where the ultraviolet lamp had broken down, we said carry on but not to say anything when they put their hand in the box. The idea was to get the elections and the process going, to get the electorate enthused, to get the process through. The minor little problems like that made no difference in any event, in the end we weren't voting in districts where a dozen votes this way or a dozen votes that way would have made any difference. In Soweto, they ran out of ballot boxes. I remember one case in particular, where the polling station's presiding officer took a pair of jeans and stuffed the ballot papers from the full ballot box into the trousers and he pulled the belt shut as his spare ballot box and they then started afresh with the emptied ballot box. The party representatives at the Nasrec counting station were of course up in arms about this and we asked whether those ballots were filled in, whether the ballots were marked by polling station staff on the back with the security stamp and whether they had an identifiable mark? We said yes, count the damn thing. We counted and we carried on. So the process worked because we had no choice. To get back to the image and metaphor of the surfboard I used earlier, we simply had to do it and it worked. It was a magnificent effort by all concerned particularly by the political leaders and the electorate. We moved into the next phase of the transition on a lovely day in early</p>	
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		May, the 10 th of May, when Madiba was inaugurated at the Amphitheatre at the Union Buildings, of course I was there, cried like a baby.	
00:28:54:18	Where did you vote?		00:28:55:20
00:28:57:10		I voted in the IEC offices. We had a special post there for the staff because we couldn't get out. I didn't get out of the IEC offices for 36 hours at that time, so I could not have gone to a polling station anywhere.	00:29:17:05
00:29:17:10	Did you at least have a quiet moment to reflect and just say wow the day is finally here?		00:29:20:21
00:29:20:23		No, we had that quiet moment the week after the elections when we had announced the results at Gallagher Estate in Midrand. We were getting results still on the Friday morning. The results from Northern KwaZulu were still coming in and those results were not yet incorporated in the final calculation. We had announced in advance that we would be giving the results at 2 o'clock on Friday afternoon. We had to do so because parliament had to meet on Monday and elect a president on Monday so that the inauguration could be on the Tuesday, which meant we had to have the results by then. The last couple of counting stations results were trickling in and while driving out to Gallagher in the car, Jorgen Elklit, our Danish proportional representation expert, was doing the calculations on a pad on his leg and as I was talking to the cameras at Nasrec, Elklit was doing the final calculations and the announcement was made within minutes of the final result having been calculated. It was tough, it was tight, it was nervous and that's when we were then relaxed, I then slept for 36 hours afterwards.	00:31:17:05
00:31:35:00	How did Buthelezi get to be on the ballot paper, what was the story behind that?		00:31:48:06
00:31:50:20		First of all, we battled with Chief Buthelezi, who is a fascinating human being and with all of his faults he has some pretty great qualities as well, but he is interesting certainly. We'd been down to Ulundi to try to	00:36:15:18

		<p>persuade his majesty, the de facto cabinet and we'd failed and were humiliated. Then the Saturday before the elections, I was sitting in the office, it was just about 1 o'clock when the chief electoral officer came in and said there's a gentleman here that wants to talk to you and I said yes who is he? The officer said the man was a Kenyan and that he didn't know what he wanted. So in walked a man, 2 metres tall, and just about a metre wide, his name was Washington Okumu and he said he was from Kenya, a political commentator, philosopher, something or other and he wanted to know if he was able to persuade Buthelezi to join the election, if we could still get the IFP on the ballot paper. I asked the chief electoral officer, he said we can do it. He said we will add a sticker at the bottom of the ballot paper. The ballot papers had been printed and they'd actually all been distributed by then but we could print stickers with the IFP and stick those onto the ballot papers.</p> <p>The will to succeed prevailed and the process worked. There have been suggestions by academics that the results of the election were so good, that it evidences a backroom deal and that the results that were announced were not really those that emulated from the ballot boxes but rather from a smoky backroom. That is total rubbish, if one just thinks about it, its unthinkable that nobody in 25 years since then has come forward with one iota of evidence to support it. To suggest that we could manipulate the results around the country so carefully, that the ANC got its substantial majority but just not two-thirds, that the Nationalists got the Western Cape and the IFP got what was then still Natal and that this was a dream result that had to have been worked out by that evil genius Kriegler, sitting behind the screens somewhere, is just sheer drivel. The result was announced maybe with errors, maybe with crookery here and there, the result which was announced was the result as we got it from the polling stations. The people had spoken and we said what the people had said. If it was a dream result it was because the electorate did it that way.</p>	
00:36:18:00	Can you tell us about Dikgang Moseneke and the role that he played?		00:36:27:11

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00:36:27:21		Dikgang and I had known one another from quite long before, when he started at the Bar in Pretoria. I was of course very interested in this bright young man who had come out of prison. So Dikgang and I had known one another, and we liked working together, I think. Another fascinating person that I met was of course Zak Yacoob, whom I had seen in court but had not actually ever met and he was a Commissioner and then we served on the CC together some years later.	00:37:09:01
00:37:10:11	How did your appointment to the CC come about? Who called you and what went through your mind when you got that phone call?		00:37:27:10
00:37:29:00		It's a good deal less exciting and more mundane than the IEC story, I'm sorry. There were nominations called for. After the election, my then wife and I had gone to Mexico to observe their elections and thereafter we went to Aspen in Colorado. While I was there, I got a phone call to say would I allow my name to go forward, was I willing to be nominated? So I said, I know nothing about constitutional law but I can learn, yes. That was Johann van der Westhuizen who had phoned me. I had been on the board of the Human Rights Centre at Pretoria University where he was the director in very, very difficult times so we knew one another and he nominated me. When I got back, I had been shortlisted, this was in August, went to an interview, the Judicial Service Commission equivalent or I think it had already been formed then under the interim Constitution and the interim legislation, the JSC was instituted in '93, '94 already so it was the JSC, the Judicial Service Commission presided over by Michael Corbett who was the chief justice, Arthur was the nominated president of the Constitutional Court, Bulelani Ngcuka some other people, politicians, academics were on the JSC and I went as a candidate and I was interviewed and my name went forward as one of the proposed ones and I was appointed. Did Arthur want me on the court? I wouldn't doubt that, that Arthur had the capacity to do so on his own, certainly not, that Arthur could speak in my favour at the Judicial Service Commission, yes, I think so. I think	00:40:26:16

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		Corbett himself would have spoken in my favour, we knew one another, I had served under him in Bloemfontein for some years, I may even have got the appointment on merit, that's just a possibility.	
00:40:31:11	Can we talk about the Constitutional Court as a new concept, what was it meant to do and why was it even necessary to have it?		00:40:46:16
00:40:47:01		Interesting, during the couple of years of the negotiations, particularly from 1991 onwards, there had been discussions in legal circles and in judicial circles and in Bloemfontein where I was on the Appellate Division, which later became the Supreme Court of Appeal, about how the judiciary would adapt, how we would deal with constitutional issues. For instance we actually had a delegation of senior judges visit us from the United Kingdom, we were thinking, and generally in judicial circles there was talk about what would happen to the judiciary. You know, I don't have to tell you but just to repeat it briefly that there were strong debates and differences of opinion within the ANC ranks as to whether they should line up all of the old apartheid judges and shoot them and start with new ones or whether they would try to adapt as they went on and make new appointments and re-educate the existing ones. They decided on the latter process but when the negotiators decided that there had to be a Constitutional Court there was once again a difference of opinion as to how this body was to be constituted, what its jurisdiction was going to be and what its juxtaposition in relation to the existing Supreme Court of Appeal would be. There was a compromise that this new body would have constitutional jurisdiction only and it would be an interim body under the interim Constitution, as the interim Constitutional Court of ultimate resort and the appointment for each judge was for seven years, to see through the transitional phase. The relationship between the Supreme Court of Appeal, the Appellate Division as it was still called, and the Constitutional Court was then settled on the basis that the Constitutional Court would have constitutional jurisdiction and the final say and the Appellate Division	00:49:30:03

		<p>would have no constitutional jurisdiction but would have the final say in all issues other than constitutional issues. It sounds perfectly neat and tidy but most lawyers will ask, having thought about it, well when is it a constitutional issue and when is it not a constitutional issue and is the question whether it's a constitutional issue not itself a constitutional issue? So that debate ensued in the years thereafter but the primary function of the Constitutional Court was to be the interim constitutional adjudicator in the final analysis and crucially to certify that the new Constitution that had been drafted by the Constitutional Assembly complied with the constitutional principles that had been built into the transitional Constitution. There had been, as I recall it and as I saw it at the time, a conflict of interest and a conflict of purpose between the Nationalist Government and the ANC in particular as to how the new Constitution had to be drafted. There was consensus on many of the issues. In fact, most of the crucial issues in the new Constitution were agreed on by both sides of the negotiating table during the CODESA process. They agreed on the model of constitutional democracy and of a unitary state. However, the IFP wasn't prepared to accept the idea of a unitary state so they withdrew from the discussion. On the ideas of constitutional union, universal adult franchise, separation of powers, bill of rights, a justiciable bill of rights, an independent judiciary, an independent state of finance administration - all of the basic pillars of a modern state were agreed upon but the parties were not agreed as to who would draft the Constitution. The government said, well let's draft the Constitution, and the ANC representatives in particular said, we have no mandate to draft the Constitution and with the greatest of respect, you guys have got less of a mandate to draft a Constitution. The ANC said we must elect a Constituent Assembly that will draft the Constitution, to which the government said, not on your nelly. The government felt that would lead to an elected pack of communists giving us a soviet constitution, not on your life they said, so there was deadlock. Joe Slovo came up with the answer. Joe Slovo who had been an advocate at the Johannesburg Bar and a colleague of mine whom I knew from those days. He died being a real Marxist but a very good</p>	
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		<p>lawyer. Joe Slovo said, why don't we do what we have done in commercial deals when two businesses want to amalgamate, they don't want to negotiate with one another while the opposition out there in the market place takes their business, they want to amalgamate quickly, carry on as a unitary unit and sort out the details of it later, so let's have heads of agreement and leave it to the lawyers to put the flesh on the bones of the skeleton that we agree upon. Everybody said, Joe you are a genius, this is the way we are going to do it, they drafted a set of principles with which the final Constitution had to comply, the so called constitutional principles that were an annex to the interim Constitution, fine, so the Constituent Assembly is going to be voted in by universal adult suffrage and in that way democracy is being satisfied because the Constitution is going to be drafted by the freely elected representatives of the people and the Constitution has to comply with these basic principles and somebody said, but who's going to decide whether the final Constitution actually complies with the blueprint that we agreed upon? Good question! The Constitutional Court will do that, so they decided that not only would this interim body be the final arbiter in constitutional issues but it would also be the final arbiter as to whether the final Constitution complied with the constitutional principles. It was a unique function for a court anywhere in the world to decide on the constitutionality of the Constitution but that was our mandate and that was quite clearly the most important case the Constitutional Court on which I served ever had to decide.</p>	
00:49:33:08	Were there familiar faces at the first meeting of the Constitutional Court, what did you think of your new colleagues?		00:49:47:01

00:49:47:10	<p>It was a fascinating time in that red brick building on Braamfontein Ridge. I knew most of my colleagues but I had never met Kate O'Regan and Yvonne Mokgoro, but Tholie I had met. Albie I had met, Arthur, John, Richard and Laurie of course I knew for many years and Ismail and I were virtually twins, we had known one another for many, many years and had a love-hate relationship, which continued on the Court. And of course, Pius, Pius and I had worked together on a commission of inquiry that Madiba had appointed to inquire into the causes of violence in prisons during the run up to the elections before the CC was constituted. Pius and I had worked closely together then and I think had come to love one another, he was a great human being. We didn't have offices, we didn't have staff and we didn't have equipment. We were lent staff by the government service and if you have ever worked in an institution where you need for people to be seconded to you for an ad hoc job, they don't send you their best people – that's an unfortunate bureaucratic reality. We got some good people and we also got some duds. But we got started. We got a registry going and we started drafting rules. It was a fun time. We started getting to know one another and of course the next major phase was then to be actually formally inducted and start our first case in those exciting days. We needed to decide how we would be called, how would we be robed, how would we deal with the delicate issue in all legal circles of seniority because we came from all over the place so we had to decide who would be the senior and we decided that we would have no seniority. We would not be addressed as 'My Lord' and 'My Lady' and we would try to make the bench a little bit lower so that there is none of this reverence for the judiciary. We also tried to have our language as simple as possible and to do away with as much of the Latin as we could. To write our judgments in the simplest of English, in numbered paragraphs. There were all sorts of elementary household arrangements that people don't think of such as the fact that you've got to get going, how we would consult one another, how a court of such a size would work together, how it would function and how we would decide on our cases. First of all, we took the Appeal Court's rules</p>	00:54:59:16
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		and practice as a guide and starting point and we built on that. For instance we never ever consult about the merits of a case before it is heard, we get the papers in advance, we read the papers in advance, we prepare the case in advance, we may even form a provisional view on the case but we do not discuss it with each beforehand, we go into court not knowing what A, B or C think about the case as an elementary precaution against unfair or extensively preconditioned pre-thinking.	
00:55:29:19	Which aspect of setting up the Court was close to your heart, was it the conferencing, was it the robes, was it the etiquette, which issue in terms of the establishment was something that you were sort of tasked with or had a strong opinion on?		00:55:49:23
00:55:50:01		I had a strong opinion on the issue of not talking to one another in advance. I had a lot of experience as a judge before, I had served in the Transvaal as it was then and at that court, where we always discussed the case beforehand and you went into court with a fairly, firmly, fixed view of the outcome and you knew what your colleagues were going to say, that's in Appeals, I then got to Bloemfontein where this was taboo and I thought wow, this is wonderful we go into court with really an open mind and I felt very strongly about that and I had no difficulty in persuading my colleagues that that's the way we should go. Another issue that I felt strongly about was that we should not follow the practice that we had done in Bloemfontein, namely that the senior speaks first and then you go down the pecking order, by the time you get to the fifth member of the court, the most junior member, all you can say is yes, of course I agree, we did away with that, we sat around	01:09:53:10

		<p>the table after the case had been heard, we decided that we would have a completely free discussion. Shortly afterwards we developed a practice where Arthur would nominate somebody as the scribe, who would lead the discussion after the hearing, as close to the hearing as possible, same day if possible, the next day if we sat late and x would lead the discussion around the conference table, we would have an exchange of views, there would be an informal poll taken of attitudes around the table, if we were of like mind all of us, not only as to the outcome but as to the route to be followed to get to that outcome, the constitutional basis of the conclusion, then Arthur would nominate somebody to be the scribe to go and write the first draft. Nowadays it's difficult to imagine with computers and close circuit, a network where people could communicate with one another was a novel idea in those days, certainly in judicial circles in this country and it was of enormous use to us that we could put out drafts and circulate them among ourselves. What also helped tremendously, I can't remember how it came about, but we had research assistants, we had clerks, whereas judges had never had clerks like this before. We had clerks before, in the sense of having somebody who keeps your court book tidy and orders your tea and sees that your gown is properly cared for in the cupboard, but no professional skill. We had no professional assistance whatsoever except with the typing of judgments. Here we had qualified lawyers as our research assistants and clerks, in the American sense of the word, and that was magnificent. I managed solely because I had outstanding clerks. Both were Americans and women to start with which was wonderful. Without them I would have never coped. I had never done constitutional work before, well not never, but always from a positivist South African public law attitude and I had been in many debates about the rule of law and about constitutions with bills of rights. But I did not have experience in constitutional law from an actual writing of a judgment experience and actually doing the real work, so it was wonderful to have the assistance of these people and I think all of the judges found it extremely useful, particularly those who'd never been on the bench before. I think it did help them a great deal. I think</p>	
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		<p>there was a marvellous interchange of skills and people like Kate and Yvonne, academics who were steeped in research and in doing computer research. What did I know about doing any kind of research like that? I'd been a black letter lawyer sitting in Bloemfontein reading heads of arguments and records presented by counsel. I learnt from the likes of Yvonne and Kate a great deal about research. I learnt from my clerks as well. Albie taught me how to write in English and I taught him what to write. He has this wonderful gift with words but he'd never written judgments before, so we jocularly said it at the time, and I think it was true, he taught me what to write and I taught him how to write it so we had a very fruitful interchange. We at times got very hot under the collar with one another. I think to succeed in law in my generation, certainly at the Bar, you had to be an egotist, pretty self-centred, pretty self-confident, used to taking decisions, used to taking the lead, so it's not easy once you've been the captain of your ship to go and sit on the bench with other captains and you are the junior captain. I had learned that in Bloemfontein and I think I could help my colleagues do that. It was Richard and I who had had Appeal Court experience. John Didcott. could never be put into any harness, he was a great free spirit. Ismail also could never be put into a harness, he was an even greater free spirit, a more voluble one and a more passionate one. It was a very strange but fruitful experience, I think we got on well with one another and by the time February of the next year came around, when we sat for our first court case, Arthur had blended us into a working team, the fact that we managed so soon and so smoothly to develop into a working team is 95% Arthur's work. Arthur who was the most remarkable human being, could quietly, unobtrusively, tactfully push people in a direction, calm people down, suggest something else and we really got to work well together. I want to claim some credit for it as well, I think Richard and I both came from a collegial background. We knew by then how a collegiate court works and saying, well there's more than one way to skin a cat, for example saying you tone down that language and I will be able to agree with you but if you put it that way you make it very difficult for me to agree with you. That kind of</p>	
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		<p>judicial give and take which is essential in a Constitutional Court. It isn't about saying, he is a liar or she is a liar, but it's about valued judgments, abstractions that have got to be brought into balance with one another, in comparison with one another, weighed against one another where the conclusion may be clear but the best route to get there may be in dispute. It's essential that there is a debate, an openness and I think that I can say with all humility but rightly I think we were a better collegiate court than the US Supreme Court where people had predetermined attitudes, where they have labels and where you know more or less in advance whether it's going to be 5-4 vote this way or 4-5 that way. We were never ever like that. Of course, we came from diverse cultural, political and professional backgrounds. I think it helped that we came from such diversity, there was no predominance of one over the other, so we worked well. I think we wrote some good judgments and we wrote some bad judgments. What was interesting were all the constitutional adjudication philosophy that we had to determine as a Court. We were now starting with a blank slate because constitutional law had never been adjudicated in this country. Do we try to give broad sweeps as guidance at the beginning as the first Court. Virtually it was decided for us that in keeping with common law countries we have a system of precedent and that what we say is binding on us and on everybody else so what we say has got to be carefully thought out but do we give broad guidance to the other courts in the country as quickly as possible or do we confine ourselves to the particular issue that arises. Do we paint not in broad sweeps but in a pointed style that can be filled in later? Laurie Ackermann for instance is a philosopher, a broad deep-thinking guy, an intellect, he was in favour of the broad sweep. Whereas I'm just a journeyman lawyer, I thought, let's be as modest as possible and say only that which has to be said as clearly as possible and we will get to the next problem tomorrow. The sufficient unto the day is the evil thereof, as said in the book of Matthew and I agreed with that so we had differences of approach and if you look at the early judgments of the Constitutional Court you could actually see that some people are much more</p>	
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		expansive, explanatory, philosophically founded and others are much more terse, abrupt and brief in their approach. There were times when I agreed with the gist of what Laurie would say but other stuff was too difficult for me so I confined my agreements to some parts of it. You'll see that there was no overt conflict ever in our judgments, even where we had fairly strong differences of opinion, we were painfully aware of the necessity to maintain comity within the Court and in our disapproval of what had been said in courts below, the temptation to speak very harshly about other judges and judgments with which we disagreed was resisted and I think to good effect.	
01:09:55:19	Had you sat on the bench during the time that they heard Nkandla or at the time that the conflict between the Court and government was at its peak, would your policy have been the same or is it part of being a judge, that integrity that no matter who you are dealing with, no matter what the case is, you have the same approach to it?		01:10:31:08
01:10:34:06		I'm not sure I want to answer that, but I can tell you that we certainly did come into direct confrontation with the executive very early on and the executive of the Western Cape early in '95 already. We struck down, I think it was president Mandela's very first proclamation, this man who walks on water and we said we strike down what you have done. It was a very, very bold but necessary thing to have done and in the result, of course, it shows that if you do the right thing, the outcome was likely to be good because we struck down the proclamation in a judgment starting at quarter to ten in the morning and at 11 o'clock president Mandela went on national television and said the Constitutional Court has struck down my proclamation, if I were to say I like that I would be lying, if I were to say I agree with them	01:12:09:23

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		I would be lying but in this country, what the Constitutional Court says is the law and my government and I will obey. I think that's the major difference between us and so many other battling emergent democracies around the world, we had a genius at the head.	
01:12:10:10	What would be your most memorable judgment during your time?		01:12:16:08
01:12:16:11		Quite clearly the certification judgment. There were other more emotional judgments, sentencing a man to death because he can't have dialysis, very difficult, very painful dealing with government intransigence in the era, very, very painful, very awkward, very challenging dealing with government finger-pointing but not getting down with the job in Grootboom for instance. Very difficult but as a lawyer the death penalty case was easy, Makwanyane was easy, relatively speaking the certification case was by far the most difficult of them all because we were literally laying the foundation for all generations to come and if we made a mistake there was no way it could be corrected later. What we said about the constitutional principles would be buried and they would have never ever been revived, so it was speaking once and speaking only once and for eternity was a very, very difficult and very onerous and ominous job.	01:13:50:00
01:13:50:23	Can you talk about the period when the Constitutional Court sent back the Constitution to the Constitutional Assembly to amend it, what was that period like?		01:14:06:10
01:14:06:13		It was extremely tense because all of these decisions had an enormous political infrastructure below them, that the points weren't law points. The points were politics. They were of vital ideological differences on some issues, for example just a simple thing of how difficult must it be to amend the Constitution. We are now agreeing that this is the solemn pact on which we are going to go into the future together, do we allow the majority next year or the year after, when they feel like it, to	01:18:45:16

		<p>change the Constitution? How difficult must you make it, how deeply must you entrench some provisions or all provisions, should some be more sacrosanct than others, if you make it too difficult to amend the Constitution you run the risk that the Constitution will be broken if it can't bend, if it can't be amended it will be chucked out, a political reality that you have to bear in mind in an emergent democracy, in any emergent democracy let alone one built on such bloodied ground as ours. So the amendments to the Constitution had been written into the constitutional principles that they had to be difficult, that there had to be special measures. The Constitutional Assembly came up with a mechanism for amending the Constitution that we thought was not sufficiently burdensome and not sufficiently difficult. There had to be more notice, you shouldn't be able to sneak an amendment in to the Constitution by tagging it onto something else, like the tail end of another statute for instance. There had to be special notice of the Constitutional amendment that is being proposed. We also said there had to be a greater safeguard in terms of weight of support in the legislature for the amendment, so we sent it back to the Constitutional Assembly. We said you must tighten this up, this is not good enough, this is too weak. The other crucial and politically very sensitive issue was a provision, I think it was constitutional principle 18, which said that the powers of the provinces should not be less in the final Constitution than they are in the interim Constitution, a broad, vague statement the content of which is perfectly clear but how you apply it is very, very difficult because there are many provisions relating to provincial powers and national powers and the interaction between them. We ultimately came to the conclusion that you cannot compare each item of power in each of the two documents, in the interim Constitution and the final Constitution. We used the image of a basket to demonstrate how to do it, this is the basket under the interim Constitution of provincial powers, this is the basket under the final Constitution, is this final basket commensurate with or larger than the one under the interim Constitution, and we came to a conclusion that</p>	
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		the powers were indeed less and that the Constitutional Assembly in reality had listened more to the ANC than to the IFP.	
01:18:50:21	With your extensive experience in this constitutional democracy from the beginning till today, with the work that you do today, what does the Constitution mean to you, what has it enabled you to do as a citizen, as a judge, personally and emotionally?		01:19:14:03
01:19:15:05		The adoption of the Constitution to me represented the attainment of a life's ambition. I had since my early days as a student of politics at Pretoria University been looking forward to the day where I could participate in a country where the rule of law was maintained, where there was separation of powers and where the judiciary fulfilled a proper role. I had toyed with all sorts of constitutional games when I was still a student, while in the political study group, while working at the Legal Resources Centre and while I was a lawyer for human rights and just in the work that I did on the bench. I was looking forward to the day where I could really be a judge under a system of law of which I was proud, that's it.	01:20:22:11
01:21:10:13 Take 2	You retired from the court in 2002, what was the next chapter for Justice Kriegler in law?		01:21:24:18
01:21:25:13		I was so privileged, the fate, God dropped an enormous present in my lap as a result of being involved in the IEC and the elections of '94, which was a world event from which I got exposure to lots of people around the world interested in elections and since 1999 I have worked in more than two dozen countries around the world in elections. I have been involved in East Timor referendums to the subsequent elections in Iraq, Iran, Palestine, Egypt, West Africa, Kenya and I have spent 6 months reviewing the failed elections of 2007. So I have had massive	01:24:54:00

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		stimulus and excitement. I spent a year in Afghanistan doing electoral work in strange societies, in exciting places, in dangerous places, in tremendous places like Timor, so I've had a new career and I think it was probably more exciting in retrospect than my career as a lawyer. It is because I do law, judicial interference in elections is a crucial element of the modern approach to elections. Electoral adjudication is my forte, I'm going to Mexico later this month to go and participate in a conference on the topic. I'm going to be in Spain in February on the same and I've met wonderful people in fascinating places so I have been busier with that than I would have liked to have been at times and I'm busier than I would like to be because I believe there's time and a need for me to spend time in this country, at the moment where I think we are facing very, very serious challenges and for that I think all people who have the ability and the knowledge should be engaged in trying to right the ship again, we've gone off course, we've got this glorious dream, our Constitution and our democracy is not an event or a place, it's a journey, it's a challenge, we've all got to work at it and I believe that I've been trying to do a little, I haven't done enough. I think there are constraints on what a former judge can properly do or can be perceived properly to be doing. I know that the Chief Justice has expressed disapproval of what I do, as a result of his disapproval, I no longer feel welcome on Constitutional Hill, I feel it's lost for me.	
01:25:04:08	Was it sad for you to retire, was it something you would have chosen for yourself if it had not been for the statutory limits?		01:25:21:08
01:25:21:15		I had wanted to do more work after, I did not want to walk away, I felt young enough. I felt vigorous enough and I still do and it is many years later but there's a time to come and a time to go. It's also in Ecclesiastes, I don't long for the flesh parts of Egypt, I left there, I was grateful for the time I spent there. I spent some working time in the Johannesburg court. I did some training of Aspen judges in the Pretoria court. I did some teaching at the Justice College. I tried to get the	01:26:26:15

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		Judicial Training Institute started but politicians wouldn't let me. So I have been active. I did not long for the work on the bench any longer, I was happy to have gone.	
01:26:26:20	What has been your biggest heartbreak post-1994 under this constitutional democracy?		01:26:42:00
01:26:42:06		Undoubtedly the degeneration of the criminal justice system, which is absolutely vital to the preservation of the rights, freedom, safety of the most vulnerable in society and this frightfully complicated machine with police, with prosecution, with crime intelligence, with the special units within the police and the National Prosecuting Authority not functioning properly, not interacting properly, being abused by the executive for its own purposes, that's been most painful to me. I think the most important thing is that it has to be fixed. Remedying the ills of the state owned enterprises or getting the money back for VBS victims that's important but the National Prosecuting Authority, the South African Police Service, the Hawks, the Crime National Intelligence, these have got to be gotten right and they've got to be right pretty darn quickly, that's my bash.	01:28:07:03
01:28:07:21	In what capacity were you involved with the Life Esidimeni case, what was it like working on such a devastating case?		01:28:22:06
01:28:22:20		I'm involved at the moment, I'm a member of a mental health review board. I put my name forward as the result of the Life Esidimeni tragedy. I'm on the board at Section 27 and I was involved through Section 27 in trying to prevent Life Esidimeni being the disaster that it was and we were brushed aside rudely and then the tragedy followed. I felt and I still feel that we should have been a little ruder, a little more impulsive at the time, maybe we could have stopped it. So I'm working as a mental health review board member. I was sitting in Weskoppies yesterday in an appeal, I've done probably a dozen appeals by now, I've probably gone through a thousand files, doing day to day mundane	01:29:33:01

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		work, and I kick myself for having got myself into it because that takes time.	
01:29:33:13	Can you give the story behind the Constitutional Court building?		01:29:57:13
01:29:57:20		<p>We were told fairly early on, while at our uncomfortable temporary premises in Braamfontein, that we had carte blanche regarding the new Constitutional Court and where it was going to be. It was going to be the first major building of the new South Africa and the first major public building. Public works regulations would be bent and normal prescriptions for public buildings would be relaxed. We started looking for a site. I had never, from day one, had any doubt about it, I knew the Johannesburg Fort, I knew Braamfontein Ridge, I've lived in Johannesburg most of my fairly extensive life and I love the place and to me the Old Fort spoke of so much of where we come from with ghosts walking the corridors. I'd actually practiced as a young advocate, I'd been in consult with clients in the Fort itself. I had consulted with clients in number 4, the African male short-term prison part of the complex. I was devastated when I saw what was happening to the Fort which was a building dating from the late 19th century, redolent with history of my people and its folly and Kruger, the Outlanders and the whole lead up to the Boer War, which is very close to my family history. So when the Fort was abandoned in the late 70s, I think '77 when Sun City was opened in the South of Johannesburg, I was devastated to see hobos had moved in, the wood floor boards had been chopped out and then smart building contractors started stealing old metal studded doors and heavy hinges. From the day they said you could pick a site, I had said the Fort must be the place. In fact we must build the new building within the four walls, the battlements of the Fort so that the place of liberation, the place of dignity can grow out of the ashes of the place or out of incarceration and humiliation. I had wanted the Court right there. It seemed to be symbolic of what the Court was doing, what we were doing, what the whole transitional process was about. It was state land, it would cost nothing, it had been abandoned and we</p>	01:37:14:13

		<p>wouldn't be pushing out anybody else, the whole area was empty. We had the state mortuary at the one end but that was literally all. The regimental unit had got some of the offices in the Fort and the women's jail was being used properly so that was no problem. I went through the motions of going to look at the other suggested sites such as the old shoal, the old tack downtown, the site down by the Crown mines and a site in Midrand that had been offered to us. Albie and I joined up as a partnership pretty soon and agreed that that the Old Fort was the place. We bided our time and consulted our colleagues without much opposition. It really was natural but we then had a problem with the national monuments, people who said under no circumstances are you going to break down anything here, this is holy land, sacred so I took Herbert Prins, a heritage expert, with me to the Fort. Prins was the chair of the committee. We looked at some of the dereliction and determined what should be preserved and he explained to me how they have looked after the Old Fort. After that we could do a deal that we would be allowed to break down the youngest of the prisons, which was the awaiting trial prisons that had been built in the 30s, a massive building just on the north of the current battlements of the Fort and just to the south of the Constitutional Court building but we would preserve some parts of it. There was an agreement which we subsequently abandoned for good architectural reasons that we would keep the visiting complex that meant a lot to many people who'd come to see relatives in prison. We kept the staircases which you can still see today, one being built into the Court and being the security section of the court room and of course the bricks in the dry wall of the southern and eastern wall of the main court room and of the western facade of the foyer being preserved from the old awaiting trial block as a reminder of where we come from.</p> <p>I love taking people there, it speaks to me and I think it speaks to everybody. The building is so unique, it's so un-court-like. It's a litmus test of people's perceptions, just people who don't think that this is what a court should look like but it worked, it works, I don't think it's</p>	
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		being looked after properly, I think it's a difficult building to maintain, every time I see a crack or a leak or a paper notice stuck to a wall I have a pen to the heart.	
01:38:13:00	What would you say to the young people who say our Constitution is a compromised document and Mandela is a sell-out, what's your message to those people as your parting shot?		01:38:38:13
01:38:42:13		One can only say, I guess you should have been there. It's easy to be smart after the event. I think that it is a gross misunderstanding of where we come from. It's a gross misunderstanding of where we are and a gross misunderstanding of where, inshallah, we are going. Of course it's a compromise, which doesn't satisfy anybody, that's inherit in a compromise but it's also inherit in a compromise that we say we've agreed to this because we thought it was in the interest of all of us and it can only be in the interest of all of us if we stick to it, your bond is your bond, your word is your word, I have no doubt whatsoever that Cyril Ramaphosa negotiating with Roelf Meyer did the best possible deal in the circumstances that could have been done and it's very easy to be smart now. The South African Defence Force, the strongest probably in the Southern hemisphere, controlled tremendous fire power, the liberation movements could not have overthrown the government by force at all, a compromise was necessary, the compromise that was negotiated was fair to all concerned whether we	01:41:13:23

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		have done what we should have done in terms of that compromise is something else, for instance whether the Truth and Reconciliation Commissions findings were followed up with sufficient vigour, prosecutions for people who had been found not to have qualified for indemnity should have been prosecuted, those are other issues, but to say that Madiba sold out, I find it difficult to reply to that without getting very, very emotional, you should have been there, it was not that easy.	
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