

Conversations with Emeritus Professor Christopher Forbes Forsyth
Part 1: Early Life and Career
by
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This is an interview with the thirty-fifth entrant in the Eminent Scholars Archive. Christopher Forsyth was the Professor of Public Law and Private International Law (2005-16) and inaugural Sir David Williams Professor of Public Law (2016-17) at Robinson College. The interview was recorded at Professor Forsyth's home south of Royston.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle. Her questions are in **bold type**.
Professor Forsyth's answers are in normal type.
Comments added by LD, [*in italics*]. Footnotes added by LD.

1. Professor Forsyth, it's a great privilege to interview you for the Eminent Scholars Archive. You've had a varied and illustrious career which started in the early days with the implementation of the National Party's controversial racial policies in South Africa when you were an undergraduate at the University of Pietermaritzburg. You progressed via Cambridge, Canterbury and Cape Town until you established yourself at Cambridge once more in the 1980s when you became a Fellow of Robinson College and ultimately the inaugural Sir David Williams Professor of Public Law at Cambridge University.

On this varied journey you became, *inter alia*, a renowned expert on South African constitutional and judicial matters, UK administrative law and a sought after constitutional consultant for emerging Commonwealth countries. You also have close links with the Law Faculty at the University of Hong Kong. During this time you have written numerous books and journal articles, and I am sure that our readers will listen with great interest to your views and your reminiscences on this wide range of topics and some of the controversies you have encountered. So could we start with your early life? You were born in 1949, one year after the National Party took over the governance of South Africa in 1948.

After the war my father stayed in the army and was seconded to the British Army to work in signals and radar, and that's how he came to be living in England. My parents had been living in England in the late 1940s/1950s, and I was born in England and there were strong South African connections.

2. I wondered about that. So your parents were actually South African?

Yes, and it would be interesting to go into the details of which parts were South African and which parts were more British or whatever; a very sort of mixed bag.

3. Any other background information before we move to your primary schooling

No, I don't think so.

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4. Bearing in mind, of course, for the readers, that you grew up in the 50s and 60s immediately after the 1948 election, and while you are still at primary school, you do remember the 1958 general election in Vereeniging² when Blaar Coetzee³ the Nationalist candidate won and your mother explained the politics to you?

Yes. I was, I think, about eight years old. We had to get out of the way quickly because this group of rather rumbustious, probably slightly drunk men were coming down the road. They were celebrating the victory of Blaar Coetzee and I didn't understand quite what was going on and my mother explained the rough outline of how politics worked and it seemed to me as soon as she explained it, that it was fundamentally unjust that black people shouldn't have votes. So on that really early stage, under the tuition of my mother, my essentially liberal political views were established. The other thing that I might mention if we're talking about my childhood, my father had left the army now. Back in South Africa working as an electrical engineer in a large industry, and this was of course in Vereeniging which is notorious for the Sharpeville⁴ shooting. I remember the Sharpeville shooting very clearly, Sharpeville massacre perhaps is a better word very clearly. And going out at break in my primary school and seeing the planes circling overhead that had come really to drop bombs if necessary. We saw them fly around about my school, and then going out to change my library books and two armoured cars standing beside the library. And my father going to work in rough clothes because he was going to spend the day shoveling coal into the boilers because all of the workers had gone on strike. Those are my memories of one side of the barricades of the Sharpeville massacre.

5. Professor Forsyth, you did secondary schooling at St Stithians College⁵ under Steyn Krige⁶. This was in Sandton, Johannesburg and you were influenced by your English teacher, David Brindley, and I wonder if you could say something about this early mentor?

I think it's worth mentioning in the context of this interview in particular is that it turns out that David Dyzenhaus⁷ and I had the same English teacher in the form of David Brindley. The difference between our two situations was that he was a year or two after I was taught by Mr Brindley, as we called him, and in different schools. I was at St Stithians, and Brindley was teaching in Woodmead⁸ - a school which was founded by Steyn Krige when he was sacked as the headmaster of St Stithians College for being too liberal.

So I had my secondary education in St Stithians College and in the end I suppose I was quite successful at it because I was Dux at the school at the end, although I certainly didn't start at the top of the class. I managed to get to the top of the class by the time school ended. St Stithians was a Methodist foundation but it was, if not expressly, it was impliedly founded on the ideals of an English public school.

We had houses and team spirit and lots of sport and cold showers and so forth as suitable. I am very grateful to St Stithians because it confirmed a lot of my understanding of political views as well. Somewhere in the bumf about St Stithians - it's not in the official

² An industrial town in the former Transvaal Province (now Gauteng).

³ Barzillai (Blaar) Coetzee Hopetown, Cape Province, 14 May 1914 – Sea Point, Cape Town 29 August 1974.

⁴ A suburb of Vereeniging.

⁵ A private Methodist school in Lyme Park on the border of Sandton and Randburg in Johannesburg. Founded in 1953.

⁶ Marthinus Theunis Steyn Krige, 31 May 1934 – 29 June 2011.

⁷ David Dyzenhaus, (1957-) Professor of Law, University of Toronto (1998-), Goodhart Visiting Professor (2014-15)

⁸ Woodmead, founded 1977, was the first fully multi-racial school in SA, north of Sandton, on the Jukskei River. <http://www.artefacts.co.za/main/Buildings/bldgframes.php?bldgid=12819>



motto or anything, it talked about “creating liberal Christian gentlemen”. Of course there were only gentlemen, it was all male students at that time, although not today, of course. Christians is a nod to the original foundation. So liberal Christian gentlemen. I don’t know how many of those I can claim to fulfill. A lot of the masters, particularly the ones who came from England, which was quite a usual thing to do, to get someone like Brindley who was a very young man. He’d just got his Cambridge degree or it might have been an Oxford degree, I do not recall.

I know his academic hood furry and Cambridge or Oxford were like that at the time. Every year there’d be one or two people from the United Kingdom would come out. They would finish their degree in the UK and then come and spend two or three years teaching in South Africa and some of them stayed and some of them went back and so forth. Brindley was an absolutely inspiring teacher of English and if my writing has any clarity and colouring it must in part be due to Brindley’s teaching. He had great enthusiasm for vigorous English and use of colour and metaphor and so forth, and I can remember that Macbeth was one of our Shakespeare plays and we took Macbeth to pieces in the English classes and he was very impressive and had a great effect on me. I think David Dyzenhaus would say much the same sort of thing about him. So it’s intriguing that this one man should have been so influential in the lives of two of your interviewees.

6. Indeed, yes, and David Dyzenhaus will come up again when we speak about your interesting involvement in the Truth and Reconciliation Commission.

Yes.

7. Your academic success at St Stithians propelled you to the University of Natal in Pietermaritzburg and although one would think from what you’ve said you excelled at English, you were obviously very good at maths because you read maths and did a BSc in mathematical statistics and maths, as well as two years’ economics, for which you received a first class result in your first year. What made you decide not to follow maths as a career?

That’s a very good question and I’ve got to think a bit about it, because it’s something which took place over a period of time. My mother first of all. I think she was the only woman in her class reading maths at UCT before the war, and so she was a mathematician and she became a formidable teacher of mathematics and so in one sense it was the family business, mathematics. My father as an engineer also had a great deal of applied mathematics in his background, so it’s not surprising perhaps that I was thinking of maths.

But I realised in my final year of mathematics that I probably wasn’t good enough to be a really good mathematician and I didn’t want to spend my life teaching maths at a secondary school when I probably would not have been good enough to teach maths at a university.

So I was looking for something else to do and I was becoming more and more politically involved in that I wanted to devote my career or life doing something about combatting the injustices that were everywhere in South Africa. So that’s why it seemed to me that law might be a direction to go. I had naive ideas about using the law to create equality. I would now think these as relatively naive ideas, but they turned me towards law and I don’t regret that decision.

It does mean I think, and it still does to this day, that my approach to law is always logical and conceptual and founded in fundamental principles that one hopes everybody can agree about, and then you can move on to see what else is implied.



So that's how I turned to law, and the law school in Pietermaritzburg which I naturally shifted into was, I think, one of the best law schools in South Africa. It was headed by another man who was very influential in my life, Professor Exton Burchell⁹, who was part of the furniture in the Pietermaritzburg Law School.

Of course in those days law schools were very small and only about a dozen or a dozen-and-a-half members of staff to teach a great many subjects. I was taught in many subjects by Exton Burchell. We used to call him the "RM" or "reasonable man" because he was always reasonable, thoughtful, perceptive and logical in his approach to legal problems. We, his students, were much impressed by Exton Burchell, the "RM", and in a way he's why I came to Cambridge at all, in that he was a Cambridge man. He'd been an Elsie Ballot scholar at Clare, I think, either that or Trinity Hall. So he was a Cambridge man, and when I came to approach him to say I was thinking of studying abroad, he said, "Yes, of course, you'll be going to Cambridge," and he said Cambridge, and the rest is history.

8. So, before you came to Cambridge, still at Pietermaritzburg, any recollections of life on campus and how it perhaps resonated with the political developments unfolding in South Africa at the time?

Pietermaritzburg was a liberal university and so although the liberal universities were not perfect, not by any manner of means, they were remarkable at surviving in the horrific situation of South Africa. I think there were some very good and noble and brave people who I met at liberal universities in South Africa, and I was a small part of that liberal era, in that I was politically involved. I was a member of the old Liberal Party¹⁰ and I worked with one of the others. I don't think I ever paid a subscription, but I was an active hanger on of the old Liberal Party and attended - which was closed down, you may recall, by the government. It closed itself down because the government was insisting that it became uniraical, that you couldn't be a person of colour and a member of the Liberal Party, and the Liberal Party was founded on the idea of equality. I attended the meeting that closed down the Liberal Party. I then dabbled a bit with the Progressive Party and joined in the other society that was a member of the South African Institute of Race Relations.

9 This was during this time when you were doing your BSc and then your LLB.

Yes, I'd been at the University of Pietermaritzburg. I took part in many protests and I had my room searched quite frequently by the Security Police.

10. You tutored in maths while you did your law degree?

Yes.

11. Then you continued your interest in maths?

It was very, very useful to be able to. There was a system in place where the students in second and third year of mathematics, if they have the aptitude, could tutor the first years, supervising in Cambridge terms. That was convenient for me because it provided me with an opportunity to earn some money while I was a student and prepared for my BSc, to earn something in my law years. I was tutoring maths at Pietermaritzburg and I enjoyed it and I enjoyed teaching because I like to see people understand problems which have been

⁹ Exton Burchell (1917-1982) taught at Wits (1947-54), Professor of Law Pietermaritzburg (1954-?). See photo <https://www.wits.ac.za/news/sources/alumni-news/2018/lifetimes-in-law.html>

¹⁰ 1953-68. Founded on 9 May 1953 at a meeting of the South African Liberal Association in Cape Town by Margaret Ballinger (South African MP), Alan Paton (novelist), Leo Marquard, Dr Oscar Wolheim, Leslie Rubin (South African Senator), Peter Brown, H. Selby Msimang, Leo Kuper, and Hilda Kuper.



explained to them. So that's when I got interested in teaching and I was able to pay my bills by earning money from maths.

Then, of course, I had a period only of nine months, which comprised an academic year in which I had finished my law degree and I wasn't yet due in Cambridge, I had this gap before I went up to Cambridge, and Exton Burchell said I could be a temporary assistant lecturer at the University of Pietermaritzburg. So I spent an academic year teaching in the Law Faculty as a very junior lecturer.

12. Perhaps that is when you published two of your earliest pieces which appeared in 1975, "Some Aspects of Robbery"¹¹ and "What Happens When the *Lex Causae* Changes"¹², both in the *South African Law Journal*. What drew you to these two topics at this early stage of your career?

"What Happens When the *Lex Causae* Changes" is my first article on private international law which was to do with a case. If I remember it correctly, where a couple had moved from East Germany to the West and eventually ended up in South Africa, accumulated wealth and then fallen out with each other and their marriage had failed. The question was whether the law of the Democratic Republic of East Germany governed their marriage and particularly the proprietary consequences thereof, or whether it was the modern South African law, or the West German law was another contender.

This was crucial because the law had changed and in particular the law of East Germany had changed. I can't quite remember in what direction it had changed in the interim. [*LD = The court*] decided that East German law was applicable, which was relatively straightforward. How did we decide whether it was the East German law at the time of the marriage or the East German law as it had now developed? And this case established in South African law the principle that the law as it changes applied. So it's the legal system which had changed the law in regard to matrimonial property. I got quite interested in this really rather recondite area, as many lawyers think of it as private international or conflict of laws was in a sort of complex, myriad way where people shout incomprehensibly each other, rather than a principled system of thought. I thought there was something more to be said about it and I tried to say it.

Regarding about "Some Aspects of Robbery". It arose out of one of those gruesome cases that are far too common in South Africa where one man had stabbed another man to death in dispute over a packet of cigarettes and the question was whether it was... I don't know why it wasn't murder... but the question was whether it was robbery. The accused, a man called Dhlamini, argued in his defence that he couldn't be guilty of robbery. He might be guilty of theft because he had picked up a packet of cigarettes and made off with it, but he couldn't be guilty of robbery because the threat with the knife and the stabbing with the knife was not what caused him to submit to the taking of the cigarettes. The cigarettes had already fallen to the ground, therefore anybody could pick up whether he had stabbed the man or not, and therefore there had been no submission to the taking through the use of violence. It wasn't robbery and that of course is a formulistic argument, but the judge was having none of it, which quite rightly, I think he certainly got robbery. I don't know quite how I got into that because I wasn't teaching criminal law at the time, but I think again it's the logical approach that made it of interest to me.

13. The way it was written was both very informative and also, if I may say, your style

¹¹ *SALJ*, 92, 377.

¹² *SALJ*, 92, 368.



of writing came through, which had been mentioned by Professor Ellison Kahn¹³ when he did a review of your *'Private International Law'*. He mentioned your, "Flashes of quiet humour and dry wit." I wonder whether this was a style that you believe you've been able to maintain over the years in your writing on South African and UK issues?

I have to say it's for others to judge but it's very kind of Ellison Kahn, who was another huge influence in my life, it's very kind of him to say that. I'd forgotten that he'd said that, but I'm touched that he thought that. Yes, it is of course the only style I've got. I'm not sufficiently talented to write like Jane Austen one day and Frederick Forsyth the next day, or something like that. I try to be clear, I try to be logical, and I like to think that I can sometimes point out wry idiosyncrasies.

14. In 1975 you came to Cambridge to study for your LLB and you concentrated on judicial review of administrative action, civil liberties, conflict of laws and comparative law. The circumstances of your coming... I know that you were advised and it was suggested to you by Professor Burchell, but is there anything else you can tell us about how you came to Cambridge?

I don't think there's anything remarkable about that.

15. Were you at Gonville & Caius?

Yes, I was at Gonville & Caius. That was largely due to the influence of a chap, not a lawyer, who had been a student at Gonville & Caius or associated with Gonville & Caius who was a lecturer in Latin and I asked him for his advice and he said Gonville & Caius.

16. Where you obtained research prizes in 1976, '82 and '83.

Yes, they're not particularly prestigious research prizes, if I may say so, because they were for research done by research students, so they were not postdoctoral prizes. Doctoral students was something that I thought I could put my hat in the ring for and was successful, but I don't think they were the most prestigious prizes.

17. How did you find life in the UK and Cambridge compared to South Africa, not just physically and weather-wise, but also politically?

Taking politically first. Part of the whole reason why I wanted to go and study abroad was to escape from the rather oppressive and cloying injustice dominating the South African legal system and to come to a kind of quality type of democracy which functioned, and was relatively efficient and so forth. So it was positive aspects of the British political system and the British administrative system at that stage that attracted me to the UK.

The great difference between university at Pietermaritzburg and at Cambridge was of course one was playing with the big boys now, if I can put it like that. It's a world-renowned university whereas Pietermaritzburg, fond as I am of that university, it was a tiny little university. There were fewer than 1,500 students when I was there and so everybody knew everybody else very largely. In Cambridge we had very high standards to achieve and to meet, and it was also in a way taken for granted that you would get to them. The college provided the independent tutorial support and supervision and so forth. It created at its best, I think, a situation where the student and teacher are on the same side in attempting to get the student through the examination, whereas in a small university like Pietermaritzburg everyone knew who the examiner for criminal law was and students would come round and

¹³ Ellison Kahn, (1921-2007), Professor Law, University of Witwatersrand (1954-75).
<https://www.wits.ac.za/media/wits-university/alumni/documents/honorary-degree-citations/Ellison%20Kahn%20citation.pdf>



fish to see whether they could get any hints as to what might be in the examination paper and sometimes they would be successful and sometimes they wouldn't be.

In Cambridge with the examiner being unknown to the student, there was much less scope for that sort of thing than there used to be. More importantly [LD = *there is an*] intimate relationship between the student and the teacher in which they collaborate together to see the student does as well as possible. That's the system when it's working at its best. Of course it doesn't always work like that.

The other change that struck me is that Caius was a unisex college of course in 1975 and this was very much a different attitude there. Not that there was gender equality, but there was a mixture of genders, at the University of Pietermaritzburg. So that was quite a big difference that occurred to me.

18. During this time you were, from '76 to '80 secretary and member of the *Acta Juridica*¹⁴ editorial board. How did this work while you were at Cambridge, given that there was no email in those days?

I think this may be an ambiguity in my CV. I was secretary and member of the Editorial Board of *Acta Juridica* which is a UCT published journal and it had been allowed under its previous editors to fall behind. When I was doing this work, which was done from [LD= *volumes*] '76 to '82, I and the other members of the editorial board brought it up to date, we were doing this entirely in Cape Town. This was when I came back to Cape Town in the early 1980s to pick up a journal that was about five or six years out of date and I was mistaken if I said I was there in '76. I am indeed the editor of the '76 volume. It's not that I did the work in '76, I would have done it in '78 or '79 or something like that.

We were much helped in that by Ben Beinart¹⁵, another luminous figure in South Africa in legal academia who was for quite a while the Barber Professor of Jurisprudence at Birmingham, the same chair that David Feldman¹⁶ held I think before he came to Cambridge. Ben Beinart had a half-organised festschrift. Colleagues had written various articles in praise of Ben Beinart and the response to the invitation to help with the festschrift went out so widely and enough material came back to make it all into a festschrift. That's what we produced and that's how we caught up the missing years, by this mammoth, desperate effort for Ben Beinart which was published there. Published both separately as a festschrift and yearly as an '*Acta juridica*' volume.

19. Indeed, and very interesting about Ben Beinart. Of course his reputation is legendary.

Professor Forsyth, could we come now to some of the mentors or the academics that you would have encountered during your first sojourn at Cambridge. To this end I have given you a list and I wonder whether you might run through any memories of the professors and then some of the lecturers.

Talking about the professors, the one that stands out and therefore was in my mind was Kurt Lipstein¹⁷. I think that he's classed as a comparative lawyer and also for conflict of laws. [LD = *I was*] very impressed by him and he stimulated what I thought about the conflict of law as a comparative subject, and that we should try and build conflict of law

¹⁴ *Acta Juridica*, UCT's Law Faculty's law journal, published annually as a single issue. Comprises commissioned articles on a theme for each year, founded in 1956.

¹⁵ Ben-Zion Beinart (1914–1979), Professor of law Rhodes University (1945-49), WP Shreiner Professor of Law UCT (1950-74), Barber Professor of Jurisprudence Birmingham (1975-79).

¹⁶ David Feldman, Rouse Ball Professor of English Law (2004-18).

¹⁷ Kurt Lipstein (1909-2006), Professor of Comparative Law, Cambridge (1973-76).



systems that fit in with each other by profound comparative studies of the choice of laws. He was a great enthusiast for the comparative method and he infected me with it. So, yes, he is certainly a person I would mention.

Many years after, when the book was published giving the account of various people that came to this country in flight from Germany in the 1930s¹⁸, I was really pleased to be able to write the assessment of Kurt's work.

20. In fact he was the only subject for whom there were two entries.

Yes, the editors asked me to write a second one from a broader perspective. Anyway, he was very influential in my development. Not on this list is Sir Otto Kahn-Freund¹⁹ who was, in 1975-76, the Goodhart Professor. He also taught on the conflict of laws course and on the comparative law course and very often both Kahn-Freund and Kurt Lipstein would come to the seminars together and they would present joint seminars and that was very stimulating and exciting at times. They often held quite differing views which didn't coincide, but the most important thing is that they were both exuberating.

Of the other the Cambridge professors that you mentioned, some of which became not yet a professor of course who ought to be on this list is Mr David Williams²⁰ as he was in those days, as he also taught the administrative law course and introduced me to Bill Wade²¹ who was still at Oxford. Williams was perhaps the leading administrative law scholar Cambridge at the time.

I think Stanley de Smith²² had died so David Williams became the busiest man in the university. He was senior tutor, and serving on the Council of the Senate and various other important bodies and also teaching on comparative law and on judicial review. He made an immense impression on me because again he was always on the side of the student, trying to help the student, and he invited me and another colleague to come back to his rooms in Emmanuel on one occasion to discuss various points of difficulty we'd been having studying the course and it was incredible that the man who was literally the busiest man in the university was prepared to give seemingly unlimited hours to these very junior students. So I mentioned David Williams as well, Tony Jolowicz²³ too, whom I knew. I'm afraid I wasn't taught by Glanville Williams²⁴ or Robert Jennings²⁵.

As far as the lecturers were concerned Mickey Dias²⁶ was mentioned, of course. I was very pleased to know Mickey Dias and our paths crossed we spent many hours together [as Proctors] at the Senate House pontificating in Latin, helping students to get their degrees.

¹⁸ 2004. "The Search for Principles of "Permanent and Universal Validity": An Assessment of the Work of Professor Kurt Lipstein QC", in Zimmerman, R & Beatson, J. *Jurists Uprooted: Celebrating the contribution to UK law of German émigré legal scholars*. OUP.

¹⁹ Sir Otto Kahn-Freund (1900-1979), Professor of Law, LSE (1951-64). Professor of Comparative Law, Oxford (1964-70), Goodhart Professor (1975-6).

²⁰ Sir David Glyndwr Tudor Williams (1930-2009), Rouse Ball Professor of English Law (1983-92), President of Wolfson College (1980-92), Vice-Chancellor, Cambridge (1989-96).

²¹ Sir Henry William Rawson Wade (1918-2004), Professor of English Law, Oxford (1961-76), Rouse Ball Professor of English Law Cambridge (1978-82).

²² Stanley Alexander De Smith (1922-74), Downing Professor of the Laws of England (1970-74). Fellow of Fitzwilliam College. Fellow of British Academy.

²³ J. Anthony (Tony) Jolowicz (1926- 2011), Professor of Comparative Law (1976-93).

²⁴ Glanville Llewelyn Williams (1911-1997). Quain Professor of Jurisprudence UCL (1945-55), Rouse Ball Professor of English Law Cambridge (1968-78).

²⁵ Sir Robert Yewdall Jennings (1913-2004), Judge/President ICJ (1982-95), Whewell Professor of International Law Cambridge (1955-81).

²⁶ Reginald Walter Michael (Mickey) Dias (1921-2009), Lecturer in Law, University of Cambridge (Jurisprudence & Tort) (1951-82), RAF as tail-gunner Coastal Command (1942-46).



But I'm destroying your chronology a bit because this happened when I was in Cape Town. Mickey Dias had a sinecure, an interesting appointment shall I say, perhaps, in that he was an external examiner of the University of Zimbabwe. Every Christmas time he'd fly out to Zimbabwe and on and on one of those he came out to Cape Town and came to visit the Law Faculty at Cape Town and I got to know him quite well then. We'd done various jaunts around the Cape Town area and so forth.

I felt he was really quite a very cautious and very precise man and a great gentleman. I'm very fond of Mickey Dias. I think he had some experiences in Cape Town that weren't very good and this was of course in the days of apartheid still. Perhaps he had some good experiences with us. We were supposed to go up the mountain together but the wind was blowing and we couldn't go up the mountain in the cable car. We'd wandered through the gardens and had a lovely day and we couldn't go up the mountain because Mickey turned up in a suit with well-polished brown shoes on. So we cancelled that. Mickey Dias is a lovely man and obviously he would tell his famous stories about what it was like being a tail gunner in the RAF during the war...

21. How he enjoyed his time. Very positive.

Elihu Lauterpacht²⁷ of course was the lawyer on the committee that appointed me to my teaching fellowship at Robinson College. He was the only lawyer on the committee, so if I did the wrong he's responsible. Yes, obviously for a college appointment it was mostly college Fellows and one from outside.

Len Sealy. I particularly remember my introduction to Cambridge and they really were exceptionally interested and diligent in looking after their students. I haven't seen Len Sealy for ages, but he moved away from Cambridge when he retired. Ken Polack²⁸ I only knew slightly but he's another one of the South African mafia, if you want to put it that way. John Spencer²⁹ is on the lecturer list but he was a professor afterwards - a supremely witty man who's a very good lawyer. He never taught me but he became a very valued colleague.

22. Thank you very much. Are you okay to continue for another say ten minutes or so?

Yes, that's all right.

23. Thank you. That brings us then to 1977 when you were lecturing first at Canterbury after your LLB at Cambridge and I wondered how this came about.

It was part of a scheme to escape from South Africa. I could clearly have gone back to South Africa teaching in one of the South African universities, and alternatively I could have gone into practice through the South African Bar, although I was increasingly not thinking this way. I still thought that law could be used as a way to achieve justice. I had the wrong idea with New Zealand in mind. I thought it would be like Britain but in the South Pacific. It would be warm and gentle and a bit exotic. It turned out that Christchurch was pretty cold and snow on the ground.

I liked my students very much in New Zealand, and made some good friends. There're still friends on the staff of the University of Canterbury, but New Zealand turned out to be a very long way away from anywhere. Very good lawyers who come from New Zealand, numerous ones in Cambridge and so forth. It's not a criticism, but it's just that New Zealand's not on the way to anywhere. You get there and it all stops in a way, so I just felt

²⁷ Sir Elihu Lauterpacht (1928-2017), Hon. Professor of International Law (1994-2017), Judge *ad hoc*, ICJ (*Bosnia v Yugoslavia*).

²⁸ Kenneth Polack (1933-95), Fellow of King's College.

²⁹ John Rason Spencer (b.1946), Professor Emeritus of Law (1995-2013).



very isolated.

It was also the case that I was single and it might have been different if I'd been married and had a family life and so forth. So I decided to escape from New Zealand and I made what might have been thought to be a mistake. Lots of things turn out to be a mistake. The opportunity arose, I was approached by Cape Town who said would I come back and run this human rights conference. So I came back from New Zealand to Cape Town and got briefed about the Human Rights Conference - it was about a year before the conference and it had to be made to work and was a huge endeavour, which I'm quite proud about.

24. And the first of its kind?

Yes, it was the first of its kind in South Africa.

Also, which is quite a remarkable thing for South Africa at that time, everyone who wanted to come to it was allowed to come to it. We fought quite a battle with the South African government because they refused to say which people required visas, which many of the participants would. And people who required visas wanted to get pre-clearance - wanted the South African government to say, 'Yes. We'll give you a visa'. But the South African government refused to commit itself in advance. These were very leading people from the worlds of academia - USA, Europe, the UK and so on. In the end we took the decision to apply for the visas and forced the government to turn down the visas if that's what they wanted to do and they could deal with the opprobrium. It'd be clearly their fault, rather than cancel the conference ourselves. So we did that and it worked.

The government couldn't face in the end turning down what were in fact distinguished professors and scholars and so forth, not exactly revolutionaries. And so we did it. The government granted the visas, they all came through, so we could say that everyone that wanted to come was able to come, which was very good and it also revealed in a less flattering light some of the scholars. I'm thinking of one and I'm not going to mention his name, who refused to turn up because he thought it was too much of an imposition for him to get a visa, he should just be granted a visa automatically and this was really just an excuse to boycott South Africa.

So anyway that all happened. The proceedings were published in a single volume of *Acta Juridica* again, helping with the catch up. I think that was 1979, 1980, *Acta Juridica*, and it was a great achievement because we'd persuaded Michael Corbett, after, the Chief Justice, to come and give an opening address at the conference which had 350 or so people. He gave the opening address at the conference in which he explicitly called for a judicially enforceable bill of rights in South Africa which again at the height of apartheid was quite an achievement. So we did that. I don't know whether this may be a useful place to deal with any other questions you might have had about the Human Rights Conference?

25. I was keen to know the background, which you've outlined very succinctly, thank you.

The money for it all came from American foundations. The Ford Foundation and the Carnegie Foundation provided the flights to fly the visiting speakers, people from the United States, Europe and the UK.

26. Something else that was very interesting about this period of your life was that you visited The Hague. You were at the Hague Academy for International Law on a scholarship for study at the Peace Palace, and I wonder if you could tell us something about that?

That was just my interest in private international law. It was a year or so after the



Human Rights Conference, and I sought in some ways almost a vacation. It was a break from human rights and public law, and back to private international and my interest in that. The course at The Hague still runs in the same way; it is divided into two, public international law and private international law and I had attended the private international course and made a contribution to the discussions attended lots of interesting talks in The Hague. I spent three weeks or a month at The Hague all together.

27. Which must have fed into your book, *Private International Law*³⁰ ?

Yes, absolutely, and it was after I'd been to The Hague that I came back and conceived of the idea of writing the next book on private international law. Lots of the ideas that I developed there gave currency, certainly in South Africa, but perhaps in other parts of the world too, of multilateral choice of law rules being used to deliver the uniform decision out of the mass of otherwise incoherent approaches to the subject and that all comes from essentially the European influence on me through The Hague Academy.

28. During this time you published six journal articles, mostly in the *South African Law Journal*, and I wonder if you could sum up for us what your main research topics were during this period?

I always did some writing on conflict of laws. I'd written a few things on constitutional law but I think my articles for which I will be known in this period are my jurisprudential articles. One of these was called 'Human Rights and Ideology'³¹ and it seeks to counter a view which was quite common in left wing political circles in South Africa which was to the effect that there is very little point in having a judicially enforceable bill of rights in South Africa because this would prevent an incoming democratic government from redistributing property in accordance with the Marxist visions.

So there was a quite a strong and a dangerous movement in left wing South African politics to get away from classic liberal ideas such as the rule of law, judicial enforcement of human rights, and things like that. Essentially what I did in that article 'Human Rights and Ideology' was to take the views of Popper³² who I had started to read in Cambridge, four or five years after my LLB to take Popper's critique of Marxism and focus it into a South African context and, unsurprisingly, lead to the conclusion that we should have a democratic polity and use the judiciary to enforce human rights and so forth. I will not say my article had this effect, but it was on the side of history when it made this critique because these days nobody suggests that judicially enforceable human rights are worthless or prevent a proper political reform. It was a defence of classic liberalism and made quite a fuss at the time. Didn't make me popular, but I am quite pleased.

The other article that I wrote at this time and which David Dyzenhaus is writes about is on 'The judicial process, positivism and civil liberty'³³. John Dugard³⁴ had become in South Africa the proponent of the view that judges have a judicial discretion to make the law and therefore it was reasonable to call upon the judges to remake South African law in a way that excised obvious injustices of racial discrimination, inequality of all sorts. This requires of

³⁰ 1981. *Private International Law*, Juta & Co. 2nd Ed 1990, 3rd 1996. 4th 2003, 5th 2008.

³¹ 1980. *SALJ* 97, 103.

³² Sir Karl Raimund Popper, FRS FBA (1902-1994), Austrian-British philosopher, academic and social commentator.

³³ 1981 *SALJ*, 98, 218.

³⁴ Christopher John Robert Dugard, (b.1936-), Professor of Public International Law, University of Leiden (1998-). Professor of Law, University of Witwatersrand (1975-1990), Goodhart Professor, Cambridge (1995-96), Professor of Law at the Centre for Human Rights of the University of Pretoria (2006-).



course of the South African judges approach at that time, what I called vulgar austinism an idea that law was the command of the legally superior and that was that. There was no role of judicial creativity. This positivist view said Dugard said should be rejected and instead we should adopt a view so that the judges could intervene and say, 'No, this is an outrageous law. It's discriminatory,' or whatever it is. We're going to strike it out as a piece of law,' and that was a view that I and a friend of mine, Dr Johann Schiller increasingly came to question.

Johann Schiller was a colleague at UCT, and he left UCT at about the same time that I did and went and started a commercial career as an in-house company lawyer in Europe, chiefly because he needed to escape from South Africa, as we all were at that stage. He didn't think that he'd be able to make a career... well, I don't think I need really go into those things. He was an Austrian who came to Cape Town to teach there for a couple of years and intended to go back. He liked it and he stayed for a few years longer, and then he wanted to go back and had a successful commercial career as an in-house counsel in Europe.

He was a friend of mine, still is a friend of mine and he introduced me to the kind of positivism that is generally held up and adopted by counsel. We climbed Table Mountain together, generally once a week, sometimes three times a week we'd go up the mountain, and we'd have jurisprudential discussions up there. That was really quite wonderful. We stimulated each other and agreed along on the basis that everything else [*LD = followed*] logically with each other. He was firmly of the view that positivism was not a theory of the law, it didn't tell you what the law was, as people perceived it. Said that it's not law if it's discriminatory, telling you what the law was. It told you how you found out what the law was - that was through the use of reason and logic on the sources of law. This is what led to our criticism of John Dugard that apartheid is a legal phenomenon enforced by an army of civil servants and judges and policemen or whatever. It's a legal regime in that it's done according to the rules to a greater or lesser extent and how do you account for this anomaly and phenomenon? It's there, it's real. You could see it in South Africa every day of the week, what account do you give of it? You had to have a theory of knowledge, and your theory of knowledge, we said, was that you found out what the law was by looking at the sources of the law and applying meaning and logic to them.

If, as in South Africa's case, that meant that you had to attribute the status of law to the enactments of a deeply undemocratic sovereign parliament, you had to face up to that reality and realise that that was what was working presently, rather than just wishful thinking or even be thought of as political posturing to think that the judges were going to step in and say, "This particular law is no longer going to have an effect." It just wasn't going to happen.

We thought that, and as one might suggest it might, caused a bit of a stir. There's people on the left who had not been put off by my 'Human Rights and Ideology' article, now thought that I was criticising John Dugard. But in fairness to John Dugard I don't think he suggested that, and I think that that article "Judicial process, positivism and civil liberty" was another article that I have been quite proud of in the *South Africa Law Journal*.

29. That was fascinating. Thank you, professor, thank you very much. I think that the next stage of your career is Cambridge again, but we should leave that for our next interview. So for now we should close with my thanking you most sincerely for a truly fascinating account which I'm extremely grateful for.

You've been very patient.

30. It's been extremely interesting and I know it's going to be of great value for the archive. Thank you very much indeed.

