EQUAL EDUCATION LAW CENTRE

# THE RULE OF LAW IN TIMES OF POLITICAL CRISIS

Presented by **Adv Tembeka Ngcukaitobi SC** on 28 July 2022, on the occasion of the Equal Education Law Centre's 10th Anniversary and the Inaugural Arthur Chaskalson Memorial Lecture.

I remember Arthur Chaskalson. The generosity of his spirit. The depth of his heart. The beauty of his soul. The magnificence of his brain. I remember his judgment, even though he was never judgmental. I remember his own life as a life of values. Yet he saw the value of each person. I remember the elder, the President of the Constitutional Court, the Chief Justice of South Africa. But he was somehow everybody's equal. A man of with deep thought. Even deeper reflection. Ultimately, however, he was moved to action by emotions. Empathy. Love. Compassion. Generosity. Humility. He had boundless humanity. These were not just his feelings. They were his action, throughout his life.

For weeks towards the end of 2012, I had believed that Arthur would probably not survive his illness, which I was told was severe. I had reconciled with the inevitability of his death. A bit premature, I thought. But for a man who had given so much, to so many, for such a long time, perhaps a respite from life itself was warranted. On 1 December 2012 when Mathew Chaskalson called to tell me of Arthur's death. I was grief-stricken. It was the same feeling of losing a close relative. Maybe of losing a father, or a grandfather. All too sudden. All too unexpected. All too painful. Perhaps for many of us, Arthur's passing was tied to the role that he played in our lives, personally and professionally. Maybe we did not appreciate it when he was alive. But we felt it upon his demise.

Today it is my special privilege to give the inaugural lecture named after Arthur Chaskalson. To do so on the theme of the rule of law is a double privilege. But I am also daunted by the significance of the lecture, and by Arthur's extraordinary life. Hence, I approach this lecture with some trepidation and a great deal of humility.

I remember Arthur's deprecation of the practice too familiar amongst lawyers, and too entrenched amongst male lawyers, that is to talk about oneself. When he did speak about himself, it was often profound. Something you don't easily forget. Although not self-indulgent, Arthur was capable of self-reflection. Exactly 10 years ago, in August 2012 as he spoke of the deep horror at the murder of thirty four mine workers by the police in a labour strike at Lonmin, he would first hesitate, reluctant to condemn. Why have we allowed the conditions of black workers to become this deplorable? He would ask. At that stage I was at the Legal Resources Centre. Arthur had returned as an adviser, a role he took with some relish. The government had announced a commission of enquiry, at which the LRC had decided it would participate on the side of the workers. "You see", Arthur continued, "I would like you to explore the issue of structural inequality." For him we were to explore causes to the brutality that go deeper than met the eye. There was an obvious and manifest breakdown in the rule of law in Marikana, from multiple angles. An explanation for police brutality against black workers could perhaps be found in structural inequality, structural violence, structural poverty. Was it not delusional to speak to the rule of law to people that are destitute? And was it not arguable that white people do not the fully grasp the depth of the scars of apartheid?

Arthur hardly spoke about race. But on this occasion he did so. Not in a self- justifying way, bearing in mind his contribution to the fight to end racial injustice under apartheid. But still questioning whether enough had been done. Still examining his own position, in a country which has produced so much suffering, to so many people.

As a white man Arthur's position was guaranteed in apartheid South Africa. In August 1999 Arthur's contributions and achievements were celebrated in a glitzy ceremony by the Jewish Board of Deputies. His acceptance speech was a disarmingly honest reflection of his own position in history as a white man who benefitted under apartheid. "People are who they are because of where they come from", he would remind his audience. His grandparents emigrated to South Africa to flee from religious persecution in Eastern Europe. They knew very little of South Africa. Yet where they arrived it was not religion that mattered. It was race. "We prospered, he said as so many of the Jewish community … not only because of our work, but also because of the opportunities offered to us as whites". "We were no longer part of a marginalised group within society; we had become part of a privileged group."

This "privileged group" he would conclude was both witness and participant to the "daily discrimination and humiliation" of Africans in the hands of the law. We returned to our conversation about how we should approach the coming commission of enquiry. Arthur knew about Lonmin. In the 1970's it was known as London Rhodesia Minerals (or Lonrho). Its notorious chief executive officer Tiny Roland, a corporate raider, was once described by the British Conservative Prime Minister Edward Heath as the "unacceptable face of capitalism". Lonrho had mastered the art of working with African governments, in Zambia, Zimbabwe, South Africa and indeed the United Kingdom itself. Always driven by the desire to maximise profit. "It you want to run a case against Lonmin", Arthur concluded, "you must know something about their background, their history, their corporate culture". Here I was, learning must first direct lessons about how to approach a case from a man whose lessons were always indirect, taken only by observation. No show. No telling. Always doing. But now he was showing. Teaching. And he could afford to, after so many years in the trenches. But these were Arthur's last days. And that conversation was our very last.

Arthur's insights, perhaps instincts proved to be right. Ian Farlam, the Judge of Appeal selected by the government to preside over the Commission of Inquiry could not fault the rule of law per se. There was an unprotected strike at Lonmin. The employer, as it is entitled, applied for an interdict and got it. The order was given to the police. But it was not enforced. Perhaps it was incapable of enforcement. Thousands of workers with historical grievances had assumed control of key operations of the mine. Their demand, of a living wage is familiar to many. The service of a court order – a piece of paper – did not mean that their grievances were addressed. They would strike, not until the court told them it was illegal, but until their grievances were met. They had to enforce their strike using their own methods, not bound by law. Trade unions, AMCU and the National Union of Mineworkers were candid in their acceptance that they knew that the strike was unlawful, but they believed they could not stop it. Symbols of law and order, the police, the private security guards did not matter that much. Ideas of investor sentiment, investor confidence and economic growth were just words. What they saw were the rich mining bosses, rewarding themselves with high salaries and bonuses that were sometimes a thousand times more than the workers were earning. In some accounts it would take thirty years of a single mineworker to earn the equivalent of what a mining executive earns in one year. These rewards, not matched by performance, disproportionate to value added to shareholders and difficult to justify in a country as unequal as South Africa were at the heart of what Arthur had referred to as structural violence. They were avoidable, justified only by personal greed.

As I prepared for the cross examination of the then Chairman of the Transformation Committee of Lonmin, then Mr Cyril Ramaphosa before he earned the title President, in 2013 Arthur's lessons were still with me. Although not much was solved in that exchange with Ramaphosa, there was some illumination. A mix of economic exploitation, financial greed and political indifference can create conditions for the destruction of the rule of law in a particular locality. Economic prosperity and the rule of law are in the sense in a dialectical relationship. Although the rule of law is not always a guarantee for economic prosperity, its existence is aligned with the economic progress. A state of legal nihilism often produces adverse social and economic outcomes.

Apartheid teaches us much about this. Although its external architecture was a discriminatory legal and political system, its inner sanctum, its invisible vestige was in the economic sphere. For Arthur, a student at the prestigious Hilton School for Boys in today's KwaZulu Natal region, this was a reflection of family prestige and privilege. Yet he was always aware that this economic and social status was created and promoted by law. At the end of his August 2009 speech, he would return to this theme. "If we think back to our past for knowledge and understanding of ourselves and our community, that is a paradox [the paradox of racial privilege] we have to acknowledge."

South Africa of today, admittedly is not the same as South Africa of Arthur's childhood. Yet some of its distinctive birthmarks, of racial discrimination, remain entrenched in its fabric. To move forward it must look backward; address the lingering effects of racial discrimination; and forge a new future. At the centre of this trajectory is the rule of law. This was Arthur's ideal. But it was also his idea. It should be ours too. I wish to sketch the possibility and the constraints of the rule of law in the making of South Africa twenty eight years after we voted for Nelson Mandela to become our first black President.

Marikana might have been an early explosion in a combustible climate. In July 2021 the police did not fire a single fatal shot. Yet ten times the number of the people who were killed in Marikana died in KwaZulu Natal and Gauteng. They were killed by others in acts of mob violence. For three weeks the nation was gripped was banditry. Children losing parents. Wives losing husbands. Others injured and condemned to permanent disability. Yet at the end of it all, they began to ask whether so much death, so much suffering was worth it all. The circumstances which led to this could not be more stark. It all began with the rule of law. A former President was required by law to present himself before a Judicial Commission of Inquiry, presided over by a Chairperson that he, this former President had appointed. He had to answer to allegations of systematic theft of public funds, fraud, and corruption which he aided and abetted.

Strikingly, that Chairperson was the Deputy Chief Justice, also appointed by the same President to that role. The former President refused. As the law allows, the Chairperson of the Commission of Inquiry obtained a Court Order to compel the former President to show up. Answer the questions to the extent that they are within his personal knowledge. If he did not wish to implicate himself in potential crimes, he was under no compulsion to do so. The former President initially baulked at the idea. Then he resisted. As he ran out of options, he defied. Defiance yielded to combat. The strategy of combat was an attempt at mobilisation, slander, distortion. Only during apartheid were judges so openly intimidated. Now, nothing seems sacred anymore. Pictures of Deputy Chief Justice Zondo's house in Durban were widely distributed on social media. He was the target of a mob. For weeks before, the newspapers reported that he had been the subject of unlawful surveillance. His house, his movements, under the watch of a criminal network with apparent access to sophisticated equipment.

So, how did this happen? How was it so that the strikers of Marikana disregarded a legal injunction from the Labour Court and a former President not only defied but mobilize his supporters against the judges. Economic marginalization. Social discontent was part of the explanation in Marikana. But to get a fuller picture, we must place the rule of law at the crucible of politics first. And this is not a new thing.

Right at the outset, in 1948 when the National Party became the government, under the slogan apartheid, one of its prime targets was the removal of coloured voters from the common national voters' roll – they achieved this with the introduction of legislation in the Cape. That way the grand idea of making South Africa white could be achieved. But the law, the South African Act of Union of 1910 required that for validity such law must be supported by at least two thirds of the Members of Parliament.

Disregarding this requirement, the legislation was passed with a simple majority. When that matter came up for argument before the then Appellate Division, the Court struck down the law, finding it to be invalid, null and void and of no legal force and effect. The government was driven to a political tailspin. It announced within days that it would not accept the decision of the court and would find alternative measures to express "the will of the people". An alternative court, based in Parliament was mooted. But it was doomed from the onset.

The government changed its focus. It would now target the judiciary directly. It passed a new law to increase the quorum to eleven instead of five in cases relating to the validity of legislation, and simply pack the court with its sympathisers. The National Party got its way. The new legislation removing coloureds from the common voters' roll was passed. A majority of ten to one confirmed the law to be valid. In a direct conflict with the politicians, the judges had come second.

This was not the first time. Some fifty years earlier there was a bruising battle between the politicians and judges. The scene was Paul Kruger's independent boer Republic of the Transvaal. The case was *Brown v Leyds* where the issue was whether the Volksraad, the governing body of the Transvaal could pass resolutions and make decisions which overwrite the Grondwet – the Constitution of the Transvaal. Paul Kruger believed that the Volksraad, as the representative of the people, could not be overturned by judges. When the issue came before the Courts – the power to test the legality of the Resolution of the Volksraad came into sharp focus. The year was 1897 in Pretoria. In a language that would be familiar to today's lawyers, the young Chief Justice of the Transvaal, John Kotze framed the constitution of the Transvaal "*as a fundamental law.*" A popular government in terms of a constitution must act according to law. The courts are entitled to test whether or not legislature has acted in accordance with the fundamental law. The resolutions of the Volksraad were set aside as being invalid. There was an immediate crisis. Paul Kruger rejected the decision. On 3 March 1897 he passed Law 1 of 1897. It required judges to swear an oath to refrain from questioning the validity of the resolutions of the Volksraad, at the risk of being charged with misconduct, leading to their summary dismissal. The Law was put on hold as the Chief Justice of the Cape, Henry de Villiers, facilitated a mediation, which failed. Kotze told Kruger that no judge can contract in and out of his duty to apply the law.

On 16 February 1898 Kruger dismissed Kotze from his position as Chief Justice. No Judge resigned in sympathy with Kotze. Ameshoff resigned because he was overlooked for the position of Chief Justice. Gregorowski accepted the job of Chief Justice. Kotze's attempts to mobilize the Bar against Kruger fizzled out. Kruger got his way. It would take the astute Chief Justice, Rose Innes, to work quietly for the judges to regain their standing, as arbiters of the law.

The story of open warfare between judges and politicians played out again on Zimbabwean soil a hundred years later. Zimbabwe gained independence from Ian Smith's government in 1979. One of the sticking points in the negotiations towards majority rule was property. For twenty years the government of Zanu-PF failed the test to return the land to the majority of the Zimbabweans, whose land rights were lost during the colonial conquest. In the constitutional referendum of 1999 to 2000 the prospect of electoral defeat stared Zanu-PF in the face. Land had not been transferred to the previously disenfranchised and dispossessed. The political elite had enriched itself under the so-called fast Track land reform programme. Now a new political force, the Movement for Democratic Change was asking the urgent questions of the day. About Zimbabwe's failed revolution. When Zanu-PF lost the constitutional referendum of 2000, it knew the game was over. Political tactics had to shift. On 16 February 2000 it organized and instigated young men under the banner of "war veterans" to invade commercial farms. On 17 March 2000 Judge Garwe ordered the occupants to vacate the farms within twenty-four hours. The Commissioner of Police was required to enforce the order. He refused. No action was taken by the government. By November 2000 the situation had become chaotic with general land occupations, and systematic failures by the police to enforce court orders. Finally, the entire land reform program was declared to be unconstitutional for violation Article 16 of the Zimbabwean Constitution which guaranteed the right to private property.

This was then, the ostensible basis of the systematized attack against the judiciary. On 24 November 2000 war veterans gained entry, by force, to the Supreme Court where an application by the Commercial Farmers Union was due to be heard. They shouted political slogans, calling for Judges to leave Zimbabwe or be killed. Robert Mugabe, then president of Zimbabwe, accused the judges of protecting white racist commercial farmers. Patrick Chinamasa then Minister of Justice, publicly told the Chief Justice Anthony Gubbay that the government had lost confidence in him and he should step down. Gubbay resigned in March 2001. Zanu-PF in Parliament passed a vote of no confidence in the Supreme Court. Several judges left. Michael Gillespie went into exile. Ishmael Chatikobo resigned. Sandra

Mungwira, who had acquitted three MDC leaders accused of murder was forced into exile. Michael Mujuru fled into exile. He had made a judgment in favour of a newspaper which had been banned by the government.

Zanu-PF could now rebuild the judiciary unconstrained by the principles of the rule of law and the requirement for the independence of the judiciary. When I was one of three South African Advocates who were briefed to appear on behalf of the MDC in November 2018 in an electoral dispute involving Zanu-PF, that process for the remaking of the judiciary in the image of Zanu-PF was complete. It was also visible. The judges did not bother to hide their hostility to us; and their disdain for the arguments in opposition to the government was palpable. When a judgment was delivered within seven days, endorsing a patent fraudulent election presided over by a politically loaded Electoral Commission no one was surprised. The stories show that whenever the judges have engaged in direct, open combat with the politicians, they have always come second.

I have been running ahead of myself. The two concepts at the heart of my talk are the rule of law and political crises. AV Dicey saw the rule of law as containing three attributes in England: First, that no one can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; second that everyone's legal rights and liabilities are determined by courts; and third that everyone's individual rights are derived from the ordinary law of the land, although not from a written constitution, but the law is the source of the rights. Dicey's conception remains, but it has expanded in radical and substantive ways.

Today, the idea that the rule of law only means that the governmental authority derives law appears rather anachronistic. Instead, we embrace a thick, substantive, and ambitious idea of the rule of law. The 2020 Rule of Law Report of the European Commission represents this modern idea of the rule of law:

> *"Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts."*

This is compatible with one of Justice Chaskalson's judgments in *Pharmaceutical Manufacturers*, in which he saw rational decision-making, rather than legal authority as the basis for the rule of law. Chaskalson thought that the two indispensable elements for the rule of law, was an independent judiciary and an independent legal profession, when they both function in the public interest. Yet there are more requirements: free media; anti-corruption institutions; an effective public administration; an active and robust civil society allowed to scrutinise decision-makers, and robust institutional checks and balances.

It is this version of the rule of law that our Constitution embraces: a constraint to governmental power; an enabler to the transformative vision of the Constitution; and the setting of rules in a non-arbitrary manner. The new Constitution was intended to provide a platform for a radical and decisive break from the colonial and apartheid past. But several moments of political crisis. And here I need to look no further than the Zondo Commission report to know the nature of political crisis: a state unable to govern; captured by a kleptocratic elite; failed promises. The report has painted a picture of a failed revolution. Justice Zondo points to an ANC that is an enabler of capture, indifferent to capture, and a beneficiary of capture. Its leader president Ramaphosa fares no better. He comes out of the pages of the Zondo Commission report as a dithering leader, unable to make the crucial intervention when needed, intent at protecting his position within the party and the position of the party in government. Surely, a political crisis of governance is upon us. Surely, we have entered political stagnation, and regression. In his *Prison Notebooks* Antonio Gramsci called this a crisis of hegemony, where the old is dying, but the new cannot be born.

Things were not always like this. And here I am not comparing the democratic government with the apartheid government. I am comparing the ANC government with its own ideals that it once championed. How did we enter the crisis? In 2000 when the remaining fragments of the rule of law were being erased in Zimbabwe, South Africa was in a honeymoon phase with its judicial branch. Only five years earlier, then President Nelson Mandela had opened the doors of the Constitutional Court to inaugurate Chaskalson's Court. On 14 February 1995 Mandela declared that the Court would safeguard

South Africa's democracy. There is an obvious tension in the declaration. The function of a Court, as Justice Chaskalson declared in *S v Makwanyane* is sometimes to constrain the democratic will of the people where it is in conflict with individual rights.

That is why we do not have the death penalty, despite the fact that our crime fatigued population probably feels that we should. It is also why the property disparities have not been resolved by a referendum to scrap section 25 despite the majority of South Africans feeling that it is unfair that so few have so much land. But when you are in a honeymoon who cares about these fine theoretical distinctions. We had Mandela. We had Chaskalson. Nothing could go wrong.

By 2005, however, the honeymoon was over. On 8 January 2005 the president of the ANC Thabo Mbeki spoke at the birthday celebrations of the ANC. He identified a challenge for ANC to transform what he referred to as "the collective mindset of the judiciary" to bring it into consonance with the people who fought to liberate the country from white minority domination. Mbeki could no longer avoid the reality, as he put, that "many within our judiciary cannot see themselves as being part of these masses, accountable to them". In plain language, the judiciary had to appreciate its role as accountable, not to the not to the Constitution but to the "masses of our people". He ended on an ominous note. If this persists, it would "inevitably result in popular antagonism towards the judiciary and our courts".

The party's position continued to be ambivalent towards the judiciary. The crisis surrounding the removal of Jacob Zuma as the Deputy President of the country in October 2005 created a perfect platform for sustained vilification on the judiciary, in directions that Mbeki himself could not have foreseen when he made his January statement. In June that year the High Court gave a judgment in which Schabir Shaik was found guilty of the charges against him, which included paying bribes to Zuma in exchange for political favours. For COSATU, the trial of Schabir Shaik was a political trial of Jacob Zuma. It ended on the sinister note by questioning Hilary Squires"the choice of a long retired Judge who is a former Justice Minister of the then Rhodesia".

For the ANC Youth League the judgment was "a political verdict" which was wrong, baseless and it called upon its members to reject it. The war was relentless.

Although Mbeki would dismiss Zuma, he was no longer able to contain the ANC fragments who directed their strikes at the rule of law, no longer simply judgments they did not agree with. While Zuma ultimately became President through a combination of political and legal machinations, the ANC remained ambivalent towards the judges, with flashes of hostility. Then Secretary General, Gwede Mantashe, has been most consistent in leading the charge attacks against the judges. In 2011 he questioned the Constitutional Court for "creating a perception that it overturns anything passed by Parliament". Cases brought before the Constitutional Court, he argued were instituted by "people and institutions resisting transformation in society." Others were beneficiaries of the past regime. The courts, he concluded were being used "to overturn any progress made that is transformative in society."

So it turns out that the rule of law is challenged, not by the popular antagonism that Mbeki predicted, the rise of the people. The challenge is from a populist group. But this is not the French Revolution. There is no Louis XIV or Marie Antoinette. Nor is there the figure of Robespierre to mobilise. There are no masses waiting to storm the Bastille. No coming reign of terror.

What we have are fragments of social stagnation, political disorientation and economic disintegration. With no unifying center. Instead, there is a parasitic class, which uses the language of the people. It claims an extreme version of majoritarianism, which is absolute and unlimited. It has now begun to agitate for Parliamentary sovereignty. It has conjured up a fictional class which it has positioned against its idea of the people. Its parasitism is evident because for its survival, indeed its prosperity it depends on the same liberal institutions, the same commercial structures.

That is why it does not seek to destroy the institutions, as any self-respecting revolutionary would do, but to capture them and refocus them. But capturing these institutions is not to use them for purposes prescribed in law. It is to use them as a facade to

legitimate their control. The populism differs from popular uprising precisely for that reason. It is not popular. Its goal is the usurpation of political power through the capture of the institutions of democracy. Once these institutions are in their hands, they are used by a self-promoting elite. Sometimes they are used to erode the democratic gains. Indeed concepts such as freedom of speech, the freedom to vote and to be voted for, and the right to equality are turned into pale reflections of the wishes and desires of the ruling elite. A common feature of the leaders of the mob, indeed the conductors of the choir, is the rhetoric of the struggle.

The rule of law is not outside of capture by the mob. They first criticize it for excluding and oppressing them. Yet their goal is not to destroy it, but to appropriate it, adding it to their repertoire. Its malleability, flexibility and indeed ambiguity enables them to claim that they too are acting in accordance with the rule of law, even as they seek to distort its basic tenants.

Populist resistance against unpalatable judgments was also part of the strategy under apartheid. Geoff Budlender's reminisces of Arthur touch upon this, describing Arthur as the best arguer of a case that he had ever seen. Of course, Geoff was talking about then not now. The case he recalled was a prototype of apartheid legislation. The pass laws that caused the massacre of Sharpeville in 1960. Veli Komani was from Gugulethu, not far from where we are. Under Section 10(1)(b) of the Bantu Urban Areas Act, he was entitled to live in an urban area. His wife, however, Nonceba Komani was disallowed. In April 1975 she was told to leave because she did not have a permit to live with her husband. The supreme court had refused Mrs Komani's application. These was no funding to pursue the litigation further. Yet the consequences of the regulations, like the migrant labour system as a whole was that the family had to be broken up. This was also the story of my father, living first in Cape Town, later as a mine worker in Johannesburg, but never with my mother and family.

The Legal Resources Centre was newly established, having been launched in 1979, after its research wing the Centre for Applied Legal Studies had been formed in 1978. The LRC should also have been launched in 1978, but Arthur was busy with the terrorism trial against Tokyo Sexwale which had to be reconvened because the judge in the middle of the trial. In the meantime, CALS was launched, based at Wits University.

When the Sexwale trial was over, Arthur could assume his role as the LRC's founding national director, and Budlender was the attorney employed by the LRC. The LRC did not charge its clients. Reflecting on the mission of the LRC in an interview by Columbia University in 1999, Arthur did not see the LRC as taking over people's struggles, but as removing the legal obstacles placed by apartheid. Ultimately, people had to be self-reliant. Apartheid laws, founded on racism, made this impossible. This is why they had to be challenged.

The Komani case was one of these. Arthur's view was that although the Komani case was "obviously the sort of case" the LRC should do, he was not sure "whether there is any substance in the appeal". There was strong precedent against the argument that had been run at the court below. In written argument before the court of appeal, Arthur and Felicia Kentridge, who was his junior, accepted that no rights were conferred to unlawful residents. Previous cases on the section had no bearing to the case, they submitted. This was because the Regulations under which they were decided had been repealed. New regulations were in place. It was in terms of these Regulations that a further document referred to as a "lodger's permit" for residence was required. But this requirement for a lodger's permit had no foundation in the Act itself. And here was the loophole in the law that would be exploited. Making an *ultra vires* argument, on its own, was not enough.

The written argument proceeded: "the implementation of the Regulation interferes radically with the right of persons … to enjoy a normal life and to live together with their dependents as a family. This is destructive of the fabric of society and inimical to public policy."

The idea that Africans could enjoy a normal married life, to live together with their dependents, to live as family might strike one as common sense. But then it wasn't. Africans were units of labour, devoid of feelings. Disrupting their family structure was the inarticulate premise of the pass law system whose larger goals were to serve the economy. The argument was not based on rights, however. There was no Bill of Rights. It was based on the rule of

law. The Act exempted from control Africans that were born or permanently residing in an urban area. A permit system which detracts from the rights of exemption of such persons and makes them subject to the arbitrary discretion of an official is inconsistent with the Act and accordingly invalid. The argument was perfectly compatible with the scheme of apartheid, although its objects were subversive of it. The sole question, Arthur would urge was the validity of the regulations, not their interpretation.

The panel of judges of the Appellate Division, presided over by Frans Rumpff struck down the regulations as invalid. Thus, Mrs Komani was entitled to remain in Gugulethu. This was a stunning defeat for the apartheid government illustrating the potential for the careful implementation of the rule of law in a hostile legal climate. Yet as Richard Abel has shown the administration boards – the actual enforcers of the influx control regulations – defied the judgment. They had political backing. Piet Koornhof, the cabinet minister announced that it was completely wrong to infer that there would be a large scale influx of wives and children as each case would be administered separately. This gave an imprimatur to refuse to implement the judgment. Although the regulations were struck down, bureaucrats continued to subject wives and children to arbitrary requirements.

Faced with adverse publicity, from people like Benjamin Pogrund of the *Rand Daily Mail*, parliamentary inquiries by Helen Suzman of the opposition, the government finally relented. It would now instruct the officials to respect the authority of Komani.

The success of Komani despite fierce resistance planted the seeds for the destruction of the obnoxious system of pass law. When cases like were brought to Court some four years later, the flood gates were wide open. It was impossible to put the genie back into the bottle. Petty apartheid would indeed in 1989 be abolished. It had become impossible to manage. The Komani case occupies an iconic place in the pantheon of legal strategies across the world. Its prime mover and arguer was Arthur Chaskalson. So much stood in the way. The impact of the case was profound. It was perhaps one of those cases which simply could not be replicated. And maybe Geoff was right after all: Arthur was the best arguer of a case.

Arthur's appointment as the president of the first Constitutional Court was undoubtedly most deserved. But he did not believe he was entitled to it. It was an old comrade, South Africa's first justice minister Dullah Omar who broke the news. When Nelson Mandela finally made the request, "It was put to me as if I would be doing him [Mandela] a great privilege." It was, "with a very gracious manner" Arthur recalled, speaking to one of his former clerks, Adrian Friedman. When he considered his role as president of the Court, his ambitious vision was to forge a completely new path – start from a clean slate. On 24 June 1994, he wrote to Judge Frank Kirk-Cohen of the Transvaal Provincial Division expressing this view: "We will start with a clean sheet, with no precedent to bind us, and will have the responsibility of giving life and substance to the provisions of the constitution." His view of the Constitution was that it was a complete break from the past, not subservient to colonial and apartheid legal precedents. Like the celebrated chief justice, James Rose Innes who laid the foundations of South African law in the early stages of the union government, Arthur would do the same, guided only by principles of freedom, human dignity, equality.

Yvonne Mokgoro, retired justice of the Constitutional Court, recalls Arthur commitment to the notion of a clean slate, a fresh start. It was this idea that made her feel welcome at the Court and confident in her new role. Judge Mokgoro would later remember Arthur "like a daddy to me, open-minded". When he spoke, he was a brilliant mind "and a clear thinker but very open- minded". He could listen to you "in such a way that you didn't hesitate to express an opposing view to his and he would just take it in with a totally open mind and open face". She continued "he was a real leader, he led not only from the front but also from the back, he could give you the chance, give you the opportunity to say it the way you want to say it, he was a leader to emulate." Mokgoro did not want him to die. She felt that he had died too soon. "I think we would have wanted to have more of him, I imagine him writing about leadership, himself writing about leading the creation of the Constitutional Court based on a Constitution in which he had such a deep great role to play in putting together."

Perhaps we didn't need Arthur to live beyond his 81 years. Or to write a book about leadership and

adjudication. We can do so ourselves. By taking lessons on adjudication from him, who was a lawyer in politically hostile climates and created a new judicial order when freedom came. What are these lessons that we can take simply from watching Justice Chaskalson in action. Arthur always accepted the inevitable political consequences of judicial decisions. Because that was not because judges were attempting to usurp the political function. It was judges simply deciding the law. The Constitution is not a valueless, colourless, purposeless document. It expressly invites the judges to promote social and economic transformation. This is not possible unless a judge engages with the legacy of apartheid. This means deliberately situating each case against the lens of accountability, transparency, and the transformative impulses of the Constitution. Here, a judge is not supine, waiting for arguments to arise from the parties, but it an active agent of constitutional development.

The idea of a judge as agent of the Constitution invites the judge to open the space for contested political ideas. But this is not a free for all. A judge should not allow a court to serve as a platform for the destruction of the judiciary and the function of adjudication. Nobody benefits from this, except the political populist, whose goal is to rule by mob. This is not to say that there is no "political" role in adjudication. The political space which is mandated by the Constitution is overturning the ethos of the Bantustan and apartheid government which were framed to operate against the interests of the majority. A judge's function is to see the bureaucracy as an instrument for transforming society.

The essence of the judicial function is to protect and promote the Constitution. This is to be achieved by speaking forcefully, clearly and plainly in judgments. Ordinarily – and this is not an absolute rule – judges are not at liberty to defend or even debate their decisions in public: "judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. It requires little imagination to appreciate that the alternative would be chaotic." Arthur's Constitutional Court explained the need for public confidence in the judiciary: "In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die." Because of this, in political cases, judges must provide clear, logical reasons.

Providing reasons is also about accountability to the political process. This means that a judge's decision must be accessible, deliberative and illustrate that the arguments have been seriously taken to considerations. Judges should not bend their judgments, the timing of their judgments, or their rules according to the prevailing political climate.

Responsiveness to the people is not the same thing as giving in to populism. We are in a dangerous age of misinformation and disinformation. We are living in the period of rising levels of extreme inequality and poverty. These have coincided – perhaps causally connected – to a form of provincialism, pushing societies further apart. This is no longer a global problem, but a local one too. We see this most visibly in the political arguments around foreign nationals, and the rising problem of crime. Soon these will become a problem for judges to resolve.

The rule of law is a powerful thing when used by the oppressed. But it can also be a tool of repression. In my own book, *The Land is Ours*, I tried to show the power of the law in the hands of native people during the period of colonial conquest, in the late 19th and early 20th century South Africa. In 1987 Arthur was a visiting professor at Columbia University. In the first of his talks he would reference British historian EP Thompson, whose 1975 book *Whigs & Hunters: The Origin of the Black Act*, was a critique of the Black Act – a statute of the British Parliament which sanctioned by death the crimes of poaching and the cutting of trees. Thompson sought to prove that the law was used as a class instrument in the hands of the land-owning classes. Yet – and here is the paradox – he would reject the temptation to conclude that law is always a mere reflection of the desires of the ruling class. In the final chapter of his book, comprising 11 pages, Thompson would astonish his Marxist friends, when he defended the rule of law as "an unqualified public good".

The power in the rule of law lies in its shifting uses between hegemonic and non- hegemonic actors. This is what endears the law to everybody– it promises neutrality, treating everybody the same. The promise that one's race, gender, class, social origin, ethnicity count for nothing is a deeply attractive feature of the rule of law.

We should take Thompson seriously. Arguing that that the rule of law is always an instrument of the oppressor classes misses its essence. Yes, the rule of law usually flourishes in democratic systems where political power is contested and the principle of equality before the law is observed. But not always. Even in oppressive system, the principles of the rule of law can influence undemocratic and oppressive systems in ways that foster the respect of human rights and create conditions for freedom. It is in this latter respect that the rule of law is most potent: as a catalyst for change and an indicator of the possibility of change.

I want to end by borrowing from Paul Landau's recent book, *Spear*, speaking of Nelson Mandela's turn to revolution. Looking back at what Arthur could achieve with the law, it is far easier to believe that things worked out as they were destined to. His dear wife, Lorraine Chaskalson made it all possible. Arthur said as much. He did not believe that he had abandoned a lucrative legal practice in a sacrificial ritual to bring us freedom in 1994. He did not know that he would contribute to the collapse of the pass system. The reality is that at each stage of his life; each crucial moment of his decision, he was always in doubt. He doubted that Mandela, the accused, could be saved from hanging. He doubted his own decision to transition from a commercial practice to a public law interest law centre. Always in trepidation, always unsure. He doubted that Komani would turn out the way he did, in fact he doubted its viability. He did not know the future. Tonight, we can say that here is a man who tried to make the future of his dreams. We should too.

Thank you.