

BEN BEINART LECTURE: 15 SEPTEMBER 2026

“FROM APARTHEID TO ILLIBERALISM”

A PERSONAL REFLECTION – AZHAR CACHALIA.*

We gather, once again today, to honour the enduring legacy of Ben Beinart, a principled legal scholar and courageous activist whose work shaped the struggle for justice in apartheid South Africa. Since its inception, this lecture has covered diverse topics in areas of public, private and commercial law. It has attracted an impressive list of speakers. I am deeply honoured to deliver this year’s lecture.

In preparing for the lecture I have had the benefit of reading the touching and thoughtful *Tribute* by his son, William Beinart, published in the South African Law Journal.¹ I commend it to those who have not read it yet.

Beinart, a Jewish legal scholar whose family had fled European persecution, had his worldview shaped by the global rise of fascism. When he became the WP Schreiner Professor of Roman Law at UCT in 1950, he observed the recently elected Nationalist government begin implementing apartheid. It would not have escaped him that many of its leaders had openly advocated fascist and Nazi ideologies, which embraced authoritarianism and racially exclusionary policies: policies that would become the hallmark of white-nationalist rule throughout Beinart’s life.

This was the context in which Beinart’s legal philosophy and political action was shaped. Throughout the 1950s, as apartheid legislation tightened its grip, Beinart’s was an influential voice of legal resistance to the systematic erosion of the rule of law. He played a pivotal role in the constitutional debates over the removal of Coloureds from the common voters roll, working closely with fellow liberal lawyers to challenge unjust laws and defend entrenched rights. His rigorous legal analysis, informed by both technical expertise and moral conviction, helped secure landmark victories such as the *Harris* case, which temporarily halted the government’s efforts to erode the franchise.

His interest in the law was not confined to erosion of the rule of law and the protection of civil and political rights, regardless of race and background. As a scholar he was also interested in finding the historical basis for legal rules in his analysis of Constitutional Law, Roman Law and Roman-Dutch law, sources of our common law.

Beinart’s activism extended beyond the lecture theatre and the courtroom. As chair of the Civil Rights League for seven years, he organised multi-racial protests, led campaigns against repressive legislation like the Suppression of Communism Act and the Public Safety Bill, and ensured the League was the first in South Africa to incorporate the Universal Declaration of Human Rights into its principles. He also

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contributed to the founding of the Liberal Party and supported the Black Sash and other anti-apartheid organisations, always advocating for a society grounded in universal human rights and legal accountability.

Ben Beinart believed that legal rules and independent institutions were essential bulwarks against arbitrary power. He championed the idea of a rigid constitution, a bill of rights, and an independent judiciary — principles that would later become cornerstones of South Africa's democratic order. Courts, he believed, could only perform this vital function if judges had the required "training, experience, specialization and intellectual capacity."

His activism was marked by honesty, tolerance, and respect for others, and he inspired those around him to pursue justice through reasoned argument and steadfast integrity.

It would not be inaccurate to describe him as a man who was in many ways ahead of his time. The institutional pressures that accompanied working in a deeply unjust society eventually drove him into exile at the University of Birmingham in 1975. He passed away in 1979 and never got to see a free South Africa. However, his academic legacy survived through the minds he shaped. He trained a generation of liberal and progressive South African lawyers teaching them that the common law held latent humanistic values that could withstand tyranny.

As I reflected on Beinart's life I wondered what he would have thought about our Constitution, now in its 30th year, or today's threats posed to our constitutional order by malevolent actors, or the global backsliding of democracy and the rise of illiberal and authoritarian regimes.

As I pondered these questions I thought of my own experiences of racial exclusion, of political resistance, of detention without trial and being banned under the security laws of the country, defending victims of apartheid as a young lawyer, how I ended up trying to reshape the very institutions that I had been victimised by and how now I realise that fighting to defend our constitutional order is as important as achieving it.

I must start at the beginning. Being classified "Indian" meant that my father had obstacles being admitted to study medicine at Wits University. My parents had to leave South Africa in 1955 so that he could study medicine in Edinburgh, Scotland. My two younger brothers and I were born there and that is where I began my first year of school. After my father graduated with a medical degree we returned to South Africa, which had become a Republic in 1961.

We first lived with my maternal grandparents in Newlands, to the west of Johannesburg, which was declared a White Group Area. Persons of Indian descent were required to relocate to Lenasia. My grandparents moved secretly to Vrededorp, at night, so they would not be detected. They owned a business there. Vrededorp also became an area of forced removal and resistance.

My father commenced medical practice in the early 1960s in what was known as the Benoni location, an area occupied by "Non-Whites," which was declared an Indian Group Area under the Group Areas Act of 1950, and later named Actonville. We lived in a nearby peri-urban area for a few years until we too were forced to move to Actonville. That is where I grew up and had most of my schooling.

What struck me growing up in those years was how banal yet infuriating apartheid was. Being forced to travel in an overcrowded train while white coaches went empty, or as an 11-year-old watching helplessly as my mother fought with a white owner of a bistro who refused us a cup of coffee, or being arrested for entering an African township without a permit, or listening to my white grandmother explain how she was not allowed to board a bus with her darker-skinned children.

After matriculating and studying BSc unsuccessfully at the designated Indian University of Durban-Westville for a year, I worked as a primary school teacher in 1976, the year of the student uprising precipitated by the forced introduction of Afrikaans in African schools. The event changed South Africa, and deeply affected me having just emerged from my teenage years. In 1978 I enrolled to study for a BA LLB degree at Wits, and was elected Vice-President of the Black Students Society.

In June of that year my brother and I were arrested by the Benoni Security Branch. This after we had distributed leaflets in the area calling on school students to demonstrate their support and solidarity with those who had been detained or had lost their lives following the 1976 uprising. Soon after being arrested and taken from our home in the early evening, I was driven down an isolated road and then made to get into the boot of the police vehicle, which was then shut leaving me in total darkness. From there the vehicle made its way to an abandoned mine-dump. I realised this when they stopped and I was ordered out of boot, in the quiet darkness of a silent evening. I was then subjected to a technique used by police officers to extract information from recalcitrant detainees described as hooding: a dirty wet bag was forcefully pulled over my head repeatedly to elicit admissions concerning the distribution of the leaflets, which I might add, was perfectly lawful. They stopped after I began losing consciousness and I was unable to provide any information other than admitting to having disseminated the leaflets. My brother suffered similar treatment later that night. After a week in detention we were released without charge. The only crime committed that night was by the police, not by me, my brother or anyone else.

Later that year my brother was arrested and detained again and kept in solitary confinement together with others in what was a nationwide swoop on an alleged underground network. They were held under the notorious Terrorism Act of 1967. A trade unionist, Neil Aggett, who was one of the detainees, was tortured, subjected to 62 hours of abuse and sleep deprivation, and hanged in his cell. My brother also suffered physical abuse. As a result of the public pressure that was brought to bear on the government and police, my brother and most of the other detainees were released without charge.

In June of 1981 we were arrested and detained again following protests at Wits against the commemoration of South Africa's 20th year as a Republic. After three weeks in detention and interrogation, we were released and served with five-year banning orders under the Suppression of Communism Act 1950 (later consolidated under the Internal Security Act 1982). The banning order prohibited us from attending social gatherings, participating in any anti-government protest or communicating with the media. We were confined to our homes after 18h00 and required to report to a police station once a week. Being prohibited from being in the presence of more than one person at a time made it virtually impossible to participate in any normal university activity.

The purpose of a banning order — not the first experienced in my family — was pernicious: to isolate activists from their communities and make them pariahs within them. In our case it had the opposite effect as our families, friends and community rallied to our support.

In 1983, while still banned, I was permitted to accept employment at the Legal Resources Centre in Johannesburg and had the honour to work under the guidance of Arthur Chaskalson and Geoff Budlender. Chaskalson, who himself graced this lecture in 2004, became Chief Justice and Budlender one of South Africa's most eminent lawyers. Despite receiving strong references from them, none of the large law firms to whom I applied offered me articles.

In June of that year my banning order was lifted together with more than 50 other individuals.

Later that year, in August, I, together with hundreds of anti-apartheid activists representing more than 400 organisations, launched the United Democratic Front. This was the culmination of years of work by the 1976 generation, who had painstakingly built grassroots community organisations, knitting them together in a mass movement. Being present there was an exhilarating experience. We believed then that the freedom struggle was unstoppable, a belief that proved well-founded a few years later. The UDF's immediate purpose was to oppose the government's dubious "reforms" in granting minimum political rights for "Coloureds" and Indians while excluding Africans. Its long-term demand was the realisation of a non-racial democratic country.

In 1984 I joined the law firm Ismail Ayob and Associates where I had the privilege of working with some exceptional lawyers, among whom was Ismail Mahomed SC, who later became Chief Justice. Ismail Ayob was Nelson Mandela's lawyer. Most of the work I did at the firm involved defending anti-apartheid activists and freedom fighters.

In the meantime, the UDF grew to embrace more than 600 organisations, to mobilise millions of South Africans in resistance to apartheid, and to call for the release of Nelson Mandela and demand a national convention — a demand made by Beinart

more than three decades earlier. Huge numbers of activists, including children, were detained and many lost their lives as the state attempted to suppress the uprisings.

In 1985 I was elected to the national executive committee of the UDF as its national treasurer following the arrest of most of its leadership who were charged with treason. The state's case was that they had fomented violent uprising in the Vaal Triangle with the aim of overthrowing the government. Ultimately this and other attempts to criminalise the UDF's activities through the courts failed.

In June 1986, the government, having been unable to contain mass resistance, declared a nationwide state of emergency. I was arrested and held in solitary confinement at John Vorster Square — my third arrest and detention — in a nationwide swoop. My daughter was barely two months old at the time. Being unable to see her and my wife at the time was gut-wrenching.

During my interrogation by the Security Branch it had become clear that the government's ability to control events had weakened and they had begun looking for ways out of the impasse. The Security Branch believed that we were seeking to overthrow the government and usher in a communist-inspired one-party state. I insisted that we sought a democratic state underpinned by a constitution and a bill of rights, a constitution that would uphold even their rights.

Upon my release, six weeks later, I resumed my responsibilities for the UDF, but was compelled to do so undetected, as far as I was able to.

I joined the law firm Cheadle Thompson and Haysom in 1987, in the middle of the Emergency. This move profoundly influenced my approach to law and legal practice. My colleagues, who are all storied South Africans, included Halton Cheadle, Peter Harris, Norman Manoim, Paul Benjamin, Clive Plasket, Richard Spoor and Fink Haysom, who sadly passed away in May this year.

We faced a very different situation from that of Beinart and his colleagues in the 1950s. Then, driven by the ideological fervour of racial separation, the government set about consolidating its grip on power by outlawing the ANC and PAC and jailing their leaders. Many were forced into exile, including members of my family. Beinart's work was aimed at exposing the debasement of our legal system.

By the late 1980s the situation had changed fundamentally. Faced with mass resistance, a struggling economy and international isolation the government could barely govern, even in an emergency. It became desperate and brutal, employing a variety of draconian legal tools it had at its disposal. When these proved inadequate it increasingly used illegal means, which included widespread torture of detainees and the assassination of political opponents. This was the context in which we came to practise law.

Our work included resisting forced removals, providing legal defence for activists and freedom fighters, including those facing the death penalty, supporting conscientious

objectors refusing to fight in the apartheid army, assisting the growing labour movement and journalists who were reporting these events.

The state of emergency with its draconian legal framework posed an almost insurmountable hurdle for us as lawyers. The purpose of the emergency regulations was to suppress the popular uprising against the state. But it was in effect an attack on what was left of the rule of law itself. Haysom, writing at the time, set out precisely how.

The regulations, he argued, were designed above all to sever the last threads of accountability over the security forces. An “ouster” clause in the Public Safety Act barred the courts from even pronouncing on the validity of emergency regulations, while a blanket indemnity shielded police and soldiers from the legal consequences of reckless or criminal conduct. What remained was a raft of sweeping discretionary powers — to arrest without warrant, detain without trial, censor the press, seize newspapers and close publications — powers so broadly drawn, he wrote, that they could only have been intended for arbitrary, selective and racist application. Lawyers themselves were shut out, denied access to clients in jail or in communities under siege.

The human cost, as Haysom documented it, was staggering. An estimated 35 000 people were detained during the state of emergency, up to 30 per cent of them children, warehoused in a process that inflicted incalculable psychological trauma on a generation and hollowed out the civic life of black communities. Since 1984, more than 1 000 people had been killed by the security forces, many shot in the back, a substantial number of them children — deaths made possible, he argued, by a media blackout that manufactured, in his words, “a false sense of normality” while shielding the security forces from exposure. And as state violence continued, a parallel structure of paramilitaries and vigilantes emerged to do what the police could not be seen to do, pursuing the same victims under what Haysom called a strategy of “violent stability” — one that also gave cover to the death squads operating beneath it.

What could we as lawyers do in these circumstances? Unable to challenge the Public Safety Act itself, we used all the common law remedies that were still available to attack the regulations. Initially we brought creative *habeas corpus* challenges to limit the power of arrest and detention. I was the instructing attorney in a wide-ranging challenge to media restrictions aimed at curtailing publication of security force abuse. We initially enjoyed some success in the provincial divisions, but the Appellate Division, which by then had assembled a “security bench,” soon ended whatever hope we had, just as it had done three decades earlier with removal of “Coloureds” from the voters roll.

Realising the limits of using the law to secure legal victories, we resorted to other strategies, including using whatever public platforms we had access to support public campaigns highlighting the abuse of human rights. We wrote about and published the work we had been doing.

I was served with another banning order during the emergency. Apart from being prohibited from engaging in any political opposition to the government, I was prohibited from publishing any material or being quoted in the media, and liable to a criminal penalty on conviction. There was a threat that I could be disbarred from continuing to practise as an attorney if I published any material, even if it concerned my responsibilities as a lawyer. The issue weighed on me but I nevertheless published an article in a legal journal entitled, 'Procedural Protection of Detainees and Representations for Release.'² Mercifully the threat did not materialise.

The hazards of doing this work cannot be understated. One incident that will remain etched in my memory forever was what happened to Bheki Mlangeni, a young lawyer at the firm and a political activist from Soweto. He had been working with Peter Harris investigating apartheid hit squads.

One Friday morning in February 1991, I walked into the mail receiving room at the firm. Bheki was retrieving his mail. I noticed that he had a relatively large box-like parcel in his hand. It was addressed to him. The sender's name was given as Dirk Coetzee, and it appeared to have been posted from Lusaka in Zambia — though, as I would only understand later, there was a far more sinister story behind that name than either of us then knew. Harris and Bheki had met Coetzee in Lusaka after he fled South Africa and began working with the ANC. He disclosed that he had been operating as the head of a police hit squad that would capture ANC insurgents and kill them. So Bheki did not suspect that anything was untoward when he saw this parcel. I asked him what was inside. He was rushing off and said he would open it later. That was the last time I saw him alive.

Later that evening, at home, he succumbed to his curiosity and opened the parcel. It contained a cassette player with a head-set, which concealed an embedded explosive device. He put on the head-set and switched on the cassette player. It exploded and tore through his head. He died instantly.

The device had in fact been aimed at killing Coetzee, not Mlangeni. When Coetzee received the package in Lusaka, addressed with Bheki's name on the return, he refused to take possession of it, and it was returned to Bheki. The ANC in Lusaka was apparently meant to have alerted him to expect the parcel, but no message was received.

Practising law in these circumstances was anything but conventional. We also had no illusions about the limits of what could be achieved through the courts. We therefore saw our role as supporting our clients and their organisations by providing moral support to them and engaging in public advocacy to support their cause. We sought to secure whatever legal space we could, ultimately with the hope that this would be the only way that South Africa could create conditions for a negotiated transition to democracy. As Haysom observed, this was a form of "democratic lawyering," which

² 1989(5) SAJHR 73.

“places a premium on clients’ participation and is opposed to the appropriation of legal struggles by lawyers posing as moral entrepreneurs.”

On 2 February 1990 President De Klerk unbanned the ANC, PAC and other banned organisations. President Mandela was released from prison nine days later. And so South Africa was placed on a more hopeful political trajectory that led to the adoption of the Constitution thirty years ago.

My colleagues, whom I worked with closely during apartheid’s last years, all went on to contribute meaningfully to building the foundations of South Africa’s constitutional order. I make special mention of Fink Haysom, who played a pivotal role in the drafting of our Constitution, serving as President Mandela’s legal advisor and then working as a distinguished peace envoy for the United Nations. You will be pleased to know that he graduated with a law degree from UCT and also received an honorary doctorate in 2012 for his contributions to human rights, constitutionalism and international diplomacy. I pay a special tribute to him this evening.

I was responsible for drafting the new Police Act of 1995. Against the background of what I had personally been through, it is hardly surprising that s 47(1) was inserted to prohibit any police officer from carrying out “a patently unlawful” order or instruction. Between 1996 and 1999 I established the Secretariat for the police, which is responsible for civilian oversight over the police, ensuring that policing policy reflected a human rights framework, and providing strategic and policy support to the Minister. And was appointed Secretary of Safety and Security which was a civilian position equivalent in status to the National Commissioner in 1996. Section 208 of the Constitution provides for the establishment of this body. I served on the Constitutional Assembly’s Security Committee in 1995 and ensured that it became embedded in the Constitution. Regrettably the position was downgraded after my departure in 1999, which I suggest was ill-advised. Another important institution we created at the beginning was the Independent Police Investigative Directorate, whose function is to investigate criminal offences and misconduct by the police.

In 2000 I returned to legal practice and was appointed to the bench in the following year. I retired as a judge of the Supreme Court of Appeal in 2021 after 20 years. My judicial experience of twenty years is a subject for another time. However, Beinart’s concern that an independent judiciary could only perform the vital function of protecting the rule of law if judges had the required “training, experience, specialisation and intellectual capacity” is true even today. Perhaps more so.

If the concerns in my early years were about ending apartheid and its debasement of the rule of law, now, thirty years later, I am exercised by the threats posed to our hard-fought-for Constitution. I currently chair the Board of Freedom Under Law, which has as its object to counter these threats by proactive litigation and public advocacy.

Populist leaders, including some in the ANC and minority parties, pose significant threats to South Africa’s constitutional order.

The attempts by powerful political actors to capture and repurpose state institutions for extractive purposes is well documented. Organised criminal networks working with politicians have infiltrated state institutions, including the criminal justice system. The constitutional vision of a non-racial country with racial equality as a founding principle is being challenged by an ugly brand of ethno-nationalist politics. Their project is regrettably shared by lawyers who share and promote their brand of politics. Their strategy includes undermining the authority of the courts and stoking xenophobic sentiment. Some openly declare their aversion to the Constitution, seeking a return to a parliamentary system with an executive that exercises untrammelled authority over the country. Their strategy is also to weaken and destabilise democratic institutions. The increasing failure of the state to provide even the most basic services in large parts of the country is testimony to this sorry tale.

Beinart's own exile was born of a catastrophe with lessons for us today. The Weimar Republic did not fall to invasion or coup; it was hollowed out from within. A fractured, multi-party parliament proved unable to govern through the hyperinflation of the early 1920s and the mass unemployment that followed the Depression. Article 48 of its own constitution, meant to allow the President emergency powers in a genuine crisis, was instead used with increasing regularity to govern by decree and sideline an elected legislature. And in January 1933, conservative elites who believed they could control and use Hitler for their own purposes installed him as Chancellor, then dismantled what remained of constitutional government through ostensibly legal means: a decree suspending civil liberties after the Reichstag fire, and an Enabling Act extracted from a cowed parliament barely two months later.

I do not draw this parallel lightly, nor do I suggest that we stand where Germany stood in 1933. But the pattern by which a constitutional order is captured rather than confronted — in which those with power persuade themselves that they can harness dangerous forces for their own ends, and in which economic hardship and institutional failure create fertile ground for those who trade accountability for order — is one our Constitution's framers understood well. It is also, I fear, a pattern that organised criminal networks and their political enablers are exploiting here, today, as they attempt to capture our courts, our prosecuting authority and our public service from within, rather than confronting them from without.

Of course this happens at a time when the international rules-based order has all but collapsed as illiberal democracies gain ascendancy. These are typically governing systems that combine regular, competitive elections with the systematic erosion of constitutional liberties, the rule of law, and institutional checks and balances. Rather than overthrowing democracy by force, leaders in an illiberal democracy subvert it from within by using their democratic mandates to change the rules of the state to serve their own interests, as happened in the case of Weimar. Power is consolidated heavily within the executive branch, leaving parliament, local governments and the judiciary weakened. Some recent examples include Hungary, Serbia, Slovakia, Turkey, Israel, India and increasingly, the United States.

Their brand of politics is not dissimilar to the populism we are experiencing here, except that illiberalism is usually associated with the right. Here populists clothe themselves in ideologies of both the left and the right. But don't be fooled by the colour of their t-shirts or their rhetoric. Their ultimate goals are the same.

I use the concept of illiberalism here not to describe the polar opposite of classical liberalism as a political philosophy, which emphasises free markets, individual rights, the rule of law and limited government. Or to take issue with those who advocate a radically different philosophy. But rather to describe the back-lash against constitutionalism whose main features are the separation of powers, the rule of law underpinned by universal human rights and an independent judiciary.

I must end by returning to Beinart. We lived in this country at different times, and the particular injustices we confronted were not the same: his was the tightening of apartheid's grip in its first uncertain decade; mine was its long, brutal entrenchment and eventual unravelling. Yet the more I have reflected on his life alongside my own, the more the differences seem to recede.

Both of us came to believe, from opposite ends of the same unjust system, that law could be turned against arbitrary power, even while knowing its limits; that an independent judiciary and a rigid, rights-based constitution were not abstractions but the only real defence ordinary people had against a state determined to strip them of dignity. Both of us paid a price for that belief — his was exile, mine was detention and banning. And both of us, I think, would recognise in the other a stubborn, perhaps old-fashioned, faith: that defending constitutional government is never a task completed, only ever a task resumed. It reminds me of William Faulkner's adage that "The past is never dead. It's not even past."

Conclusion

As we remember Ben Beinart, let us draw inspiration from his unwavering dedication to justice, his belief in the power of law to protect the vulnerable, and his vision of a society where human rights are rigorously defended for all. That task is as pressing today as it was then. I know this lecture has hardly had any light moments, but let us end with one. I understand from those who knew him that Ben was a larger than life, avuncular man with penchant for good food and wine. Let us raise our glasses in his memory.

***Azhar Cachalia – Retired Justice of the Supreme Court of Appeal and Chairman of the Board of Freedom Under Law.**