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## **A Man of Ubuntu: A South African Colleague's Tribute to Stephen Ellmann**

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# A MAN OF “UBUNTU”<sup>1</sup>: A SOUTH AFRICAN COLLEAGUE’S TRIBUTE TO STEPHEN ELLMANN

PENELOPE ANDREWS<sup>2</sup>

*We salute Professor Stephen Ellmann, a friend and colleague, whose commitment to the rule of law in South Africa is unsurpassed. His love and enthusiasm for South Africa’s emerging constitutional democracy is evidenced by his fine scholarship, his co-hosting of the South Africa Reading Group for the past 25 years and his friendship. He embodies the spirit of “ubuntu”. [Justices Edwin Cameron, Richard Goldstone, Catherine O’Regan, Dikgang Moseneke and Albie Sachs, former Justices of South Africa’s Constitutional Court]*

Stephen Ellmann was one of those rare human combinations – a brilliant man with a deep humility and a love of humanity. Steve’s modesty was disarming – and some would argue that this was an unusual quality for a member of the legal academy, especially among those considered to be intellectually gifted. As noted by South African lawyer, Geoff Budlender:

*He was living proof that intellectual integrity and deep moral commitment are not opposites – they are complementary, each strengthening the other.*

Steve’s endless optimism was also one of his most appealing traits, on perfect display with his response to the diagnosis of cholangiocarcinoma (also known as bile duct cancer) and his decision to avail himself of new innovative treatment. In one of our e-mail exchanges during the start of his treatment he observed:

*As I hope you know, the CT scan results were very encouraging. There’s clearly a lot of treatment still to come; this may be one of those illnesses that doesn’t get cured but just gets made chronic, and if that’s so it’s okay with me as long as I get to stick around. But even before we had the CT scans, my oncologist had already inferred that they would be positive, because she felt (and Teresa and I agree) that I am quite a lot healthier now than I was before the chemotherapy started.*

This optimism was to carry Steve through several years of treatment

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<sup>1</sup> A South African term, “ubuntu” translates into “I am because we are.” It reflects a deep human interconnectedness.

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before he died in March 2019. Throughout this period he wrote a blog, *Now Without Hesitation*, chronicling in great detail the trajectory of his illness – with optimism and sometimes humor, but rarely despair.

Remarkably, he took on the assignment of writing the biography of the late Chief Justice Arthur Chaskalson of South Africa, at the behest of the Chaskalson family, an assignment that would be a constant companion to Steve's battle with cancer. The trajectory of his cancer accompanied the trajectory of writing this important book. That the wife and sons of the late Chief Justice requested Steve to write the biography was poignant, since I know first-hand from my long association with the Chaskalson family that they thought the world of Steve. Steve and his beloved wife, Teresa, were able to visit and stay with Lorraine Chaskalson in Johannesburg in June 2016 and June 2017, seeing her for the last time a few months before her death in late 2017. By then Steve was some way along in the research for the book – which would have given Lorraine much comfort.

Steve was a brilliant scholar, a man of extraordinary depth and generosity, and certainly one of the most thoughtful scholars in the legal academy. His deep knowledge and understanding of South African law, politics and policy were unsurpassed, and for this he was widely respected and admired in South Africa and elsewhere. As noted by Geoff Budlender:

*We South Africans are very fortunate that Steve Ellmann became fascinated by our struggle for justice, and by the process of constructing a democratic constitutional state. He applied to South Africa a high intelligence, scholarly rigour, and a critical and empathetic eye. He analysed, explained, and critiqued the struggle for democracy. He helped us to understand ourselves better, and to apply ourselves more effectively to that work. He himself made a material contribution to that work – in his writing, in his work on the great death penalty litigation, and in his ongoing analysis of the evolving new Constitution.*

I know many accomplished and talented South African scholars, as well as scholars who write on South Africa, but I cannot think of anyone more suited to write the biography of Arthur Chaskalson. This was confirmed by the University of Cape Town sociology scholar, Jeremy Seekings, who noted:

*I am very much looking forward to reading his biography of Arthur Chaskalson. I know that there are very many people who agree that no one was better placed than Steve to write a critical biography of Arthur and his work.*

His keen eye on the lives of South African lawyers and the myriad ways that they engaged with the law - grappling with the contradic-

tory demands of justice and expedience, idealism and instrumentalism, possibilities and the practical limits of the law - was apparent in his biographical sketches of prominent South African lawyers.<sup>3</sup> One of the most notable was Bram Fischer, who, after representing Nelson Mandela and his co-accused in the famous treason trial that sent them to prison, purposely broke the law in furtherance of his political beliefs and ended up in jail, costing him his liberty and ultimately his life.<sup>4</sup> There were others, like Ismail Mahomed, Sydney Kentridge, Priscilla Jana, George Bizos, Navi Pillay, Godfrey Pitje, Dullah Omar and many more, who worked within the framework of the law, wielding their finely tuned legal technical skills to hold the apartheid government accountable in court. Their legal strategies were to find loopholes in the procedural and even in the substantive law, insisting that the apartheid government adhere to their own rhetoric of law and legalism.<sup>5</sup>

In my references to support Steve's applications to fund his research of the book on Justice Chaskalson, I expressed absolutely no doubt that Steve's reputation alone, as well as his admirable skills of human engagement and empathy, would enable him to solicit a trove of information to make the book a must-read for all, including those who are not trained in the law, or even familiar with the life of Justice Chaskalson. For example, this is what Stuart Woolman, a former student of Steve's at Columbia Law School and now a law professor at the University of the Witwatersrand, said of Steve:

*Steve's generosity always brought out the best in others. Steve, like my dad, was a mensch, and always helped others choose the right path. Like my father, he had a light touch: 'If you need anything, I'll be right over there. Just ask.'*

An analysis of Steve's body of writing, specifically in relation to South Africa, illustrate his reputation as a solicitous scholar with a clear and compelling voice. His noteworthy scholarly output and his impressive list of publications serve as a testament to the important research he has conducted throughout his career. In his writing he has often

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<sup>3</sup> Stephen Ellmann, *Calling to Account* (review of GEORGE BIZOS' NO ONE TO BLAME? IN PURSUIT OF JUSTICE IN SOUTH AFRICA), 15 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 406-12 (1999); Stephen Ellmann, *Two South African Men of the Law*, 28 TEMP. INT'L & COMP. L. J. 431 (2014).

<sup>4</sup> Stephen Ellmann, *To Live Outside the Law You Must be Honest: Bram Fischer and the Meaning of Integrity*, 26 N.C. J. INT'L L. 767-98 (2001). Reprinted, as revised, in 17 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 451 (2001).

<sup>5</sup> Scholars like Rick Abel have explored this paradox. The apartheid legal system had the edifice of the rule of law gives, providing a veneer of justice. In order to uphold its own logic, it sometimes actually was just - or at least led to legal victories. See Rick Abel, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994* (1995).

raised difficult and complex issues and confronted them in a thoughtful and candid manner. For example, his book, *In A Time of Trouble: Law and Liberty in South Africa's State of Emergency*,<sup>6</sup> was an incisive and valuable contribution to legal scholarship and shaped our understanding of the complexity of the pursuit of justice in an authoritarian state. Jeremy Seekings observed:

*As someone who is not a lawyer, I especially appreciated Stephen's ability to engage with and draw on multiple scholarly disciplines, literatures and approaches. This was very evident in his early "In a Time of Trouble" and, even more impressively, in his brilliant article on South Africans' attitudes to the law and courts in the final years of apartheid . . . . . in which he engaged with the then scanty survey data on public opinion.*

Steve was the consummate intellectual, devoid of bias in his analysis, with an unwavering commitment to the rule of law and social justice. Predating society's current preoccupation with branding, Steve's brand was his voice and his pen of integrity and fairness. Any intellectual inquiry centered on South Africa almost always calls for a partisan perspective, which Steve navigated with an academic equanimity that enabled him to engage with a range of actors of divergent philosophies and temperament. In person and in his writing, Steve always reassured others with his balanced and nuanced approach to life and the law.

His clear and balanced focus came through in his scholarship on South Africa's apartheid years, where he grappled with the concept of lawyering in repressive states,<sup>7</sup> including during times of emergency.<sup>8</sup> This focus combined with deep empathy was also apparent when he examined why South Africans, including those in the legal profession, chose to disobey the laws of apartheid.<sup>9</sup>

Steve's scholarship on the future possibility of a state of emergency in South Africa, and the permissible limits on the curbing of human rights, was particularly prescient.<sup>10</sup> He started examining this

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<sup>6</sup> Stephen Ellmann, *IN A TIME OF TROUBLE: LAW & LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* (1992).

<sup>7</sup> Stephen Ellmann, Editor's Introduction, *Struggle and Legitimation*, Symposium: Lawyering in Repressive States), 20 *LAW & SOC. INQUIRY* 339-348 (1995) and *Law and Legitimacy in South Africa* 407-79 (in same volume).

<sup>8</sup> Stephen Ellmann, *IN A TIME OF TROUBLE: LAW & LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY*, *supra* note 6.

<sup>9</sup> Stephen Ellmann, *To Live Outside the Law You Must be Honest: Bram Fischer and the Meaning of Integrity*, *supra* note 2.

<sup>10</sup> Stephen Ellmann, *War Powers Under the South African Constitution*, in *COMPARATIVE CONSTITUTIONALISM AND RIGHTS: GLOBAL PERSPECTIVES*, Eds. Penelope Andrews and Susan Bazilli 2005); *New York Law School Legal Studies Research Paper No. 06/07-6* (2006).

question even before President Nelson Mandela was released from prison, at a time when South Africa started the beginnings of the process of negotiations for the transition to a constitutional democracy. One of the primary tasks was the drafting of a constitution – a process in which Steve had considerable input<sup>11</sup> When Steve engaged with South African constitutional law scholars, he explored contingencies that illustrated his deep understanding and appreciation of the possibilities and the limitations of a constitutional democracy in a profoundly unequal society emerging from racialized trauma. In the manner of exploring divorce on a honeymoon, Steve insisted that constitutional scholars prepare for both positive and negative eventualities. A cursory glance at the enormous challenges facing South Africa today is testament to Steve's intellectual foresight.<sup>12</sup>

Steve's teaching and scholarship on legal ethics in the United States context enabled him to cast a keen eye on the question of legal ethics and legal culture in South Africa. His contribution in this regard was notable, and he was regularly sought after by lawyers and legal scholars in South Africa after his article on lawyers' culture in South Africa was published. He was also invited on a few occasions to deliver keynote addresses at significant gatherings that focused on the subject.<sup>13</sup>

Steve was admired and loved by a range of South Africans because of his commitment to the intellectual tradition and to supporting colleagues. As the University of the Witwatersrand legal scholar, Firoz Cachalia, has noted:

*I first met Stephen at a conference aimed at contributing to democratic transition and constitution making in South Africa, at Columbia University twenty five years ago. Stephen made a strong impression on me as a caring and considerate person on a personal level and as a scholar with a genuine and sincere interest in the South African experience because it engaged his sense of justice.*

Steve's support and guidance made it possible for South Africans to publish their work in the United States, often a precondition in South Africa for promotion and tenure. Firoz Cachalia stated of Steve after the former's publication of a chapter in *The Post-Apartheid Constitutions: Reflections on South Africa's Basic Law*, which Steve and I co-

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<sup>11</sup> Stephen Ellmann, *A Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution*, 21 COLUM. HUM. RTS. L. REV. 163–191 (1989); Stephen Ellmann, *Lawyers Against the Emergency*, 6 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 228–50 (1990).

<sup>12</sup> Some of these challenges are explored in detail in MICHELLE LE ROUX AND DENNIS DAVIS, *LAWFARE: JUDGING POLITICS IN SOUTH AFRICA* (2019).

<sup>13</sup> Stephen Ellmann, *Legal Text and Lawyers' Culture in South Africa*, 17 N.Y.U. REV. L. & SOC. CHANGE 387 (1989).

edited in 2001:

*The first book chapter I had published was in The Post -Apartheid Constitution. . . . The chapter would not have seen the light of day had Stephen not been quietly persistent and supportive, since I was the Speaker of the Provincial legislature in Gauteng by then and felt I did not have the time for academic work. The publication of this book in 2001 is a testament to Stephen's enduring commitment to the success of the South African constitutional project. His loving engagement with South Africa as a scholarly interlocutor and friend to so many continues. I cannot think of anyone in the United States whose role has not been more important.*

One of Steve's most cherished legacies was the establishment of the South Africa Reading Group (SARG), which he and I founded in 1994 and which continues today. Steve's fascination with and commitment to South Africa started when he was a professor at Columbia Law School, where he taught a course on South African apartheid law, bringing many prominent South Africans to Columbia Law School, including Arthur Chaskalson – and when he produced his first scholarly pieces on South Africa. That Columbia Law School denied him tenure remains one of the shameful episodes of my alma mater, and as the South African judge and scholar Dennis Davis has noted, “a spectacular example of parochialism and intellectual small-mindedness”.

When we established the SARG after Steve moved to New York Law School, we planned it to be a forum for South African law, politics and related disciplines, a “go to” place for South Africans visiting New York and those South African and scholars of South Africa who are based in the USA. Our plan largely materialized and the SARG has become a community of engaged and supportive scholars of South African law and politics. It would not have survived and flourished without Steve's care and commitment – and the example of engaged intellectual inquiry that he exhibited. Lennie Markovitz, Professor Emerita CUNY notes that,

*Steve guided us in the “method” of the seminar: searching inquiries usually started by him, deceptively simple questions to the presenter, always polite, never extraneous, designed to probe and expand basic assumptions and conditions of the argument. We followed Steve's example and always emerged wiser and even more committed.*

Since its establishment the SARG has hosted almost every Constitutional Court judge, including the first three Presidents and Deputy-Presidents of the Court, namely, Arthur Chaskalson, Pius Langa, Dikgang Moseneke and Sandile Ngcobo, as well as members of the High Court, including Judges Dennis Davis, Margie Victor and Fayeeza Kathree. In addition to members of the judiciary presenting their

work at the SARG, leading South African and international academics, such as Martin Chanoock, Hlonipha Mokoena, Jeremy Seekings, Thandabantu Nhlapo, Heinz Klug, Theunis Roux, Jonathan Klaaren, David Dyzenhaus and Waheeda Amien, and a range of others, also “workshopped” their research and scholarship. Some of the workshop highlights over the years even included politicians, like the former Minister of Justice, Dullah Omar, the former Minister of Education, Kader Asmal, and the former leader of the opposition Democratic Alliance, Tony Leon. Practising lawyers like Gilbert Marcus, Jason Brickhill, Paul Benjamin and Taswell Papier also presented their work, as well as civil society activists like Pregs Govender and Gertrude Fester.

In 2001 Steve and I co-edited a volume on South Africa’s Constitution<sup>14</sup> focusing on a range of issues including: the negotiations that led to the drafting of the first post-apartheid constitution; the major political players; the substantive and technical aspects of the constitution and bill of rights; the institutional and governing infrastructure; constitutional jurisprudence and the evolution of a human rights culture. With a foreword by President Nelson Mandela, some of the most prominent South African lawyers, politicians and scholars contributed to the book, many of whom were central figures in the constitutional drafting process. Steve insisted on raising funds for a subvention to enable the book to not only be published in the USA and South Africa, but that it be affordable for South Africans.

In November 2014 the SARG hosted an international conference at New York Law School to celebrate the 20th anniversary of the drafting of South Africa’s first post-apartheid constitution. Entitled “*Constitutional Rights, Judicial Independence and the Transition to Democracy: Twenty Years of South African Constitutionalism*”, the event brought together a diverse range of scholars, international, inter-generational, interdisciplinary and multi-gendered. The conference highlighted the four areas of research and scholarship that underpinned Steve’s research and scholarship, namely, constitutional law, legal education, public interest law and law and society. The vast range of topics, the intellectual engagement and excitement of the conference was a monument to Steve’s commitment to the South African constitutional project. Many of the papers were published as a volume of the New York Law School Law Review.<sup>15</sup>

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<sup>14</sup> THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW (Penelope E. Andrews and Stephen Ellmann eds. 2001).

<sup>15</sup> *Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy*, 60 N.Y. L. SCH. L. REV., Vol. 1 2015-16.



It always warmed my heart – as I am sure it does for many South Africans – that someone of the caliber of Steve, with the pedigree of a B.A. and JD *magna cum laude* from Harvard, an impeccable professional history as a former clerk for a federal judge and a staff attorney at the pioneering Southern Poverty Law Center, and an award winning author, chose to direct his energies, talents and time to the rule of law project in South Africa. There is something very noble about his engagement with South Africa and I know that it affects me and my fellow South Africans at a profound level. Professor Thandabantu Nhlapo states it succinctly:

*I met Steve Ellmann through Penny Andrews in the early 2000s during my stint at the Embassy in Washington DC, when they kindly invited me (not once but twice) to participate in sessions of the South Africa Reading Group in New York. Steve was a tireless supporter of the new South Africa and, personally I believe his excellent work in 1992 on South Africa's state of emergency, In a Time of Trouble, to be, not only a great contribution to the cause of social justice lawyering, but an uncannily accurate prediction of how the new state would unfold.*

Steve could observe and analogize the parallels in both the USA and South Africa, where the fault lines are race and racialized poverty. He knew and understood that the incomplete American experiment of constitutional democracy takes a long time to build and strengthen, and that it requires constant attention. He brought those lessons to South Africa, as well as his formidable intellectual skills and his empathy to improve the scholarly debates that contribute to strengthening both democracies.

In 2016 New York Law School officially recognized Steve's outstanding scholarship on South Africa and he was awarded the Law School's Otto Walter Faculty Scholarship Prize.<sup>16</sup> And in February 2019, a few weeks before he died, New York Law School hosted a celebration of Steve's completion of the biography of Justice Chaskalson. Steve was nearing the end of his life, and in great discomfort and pain, but he interacted with the audience in his thoughtful and even humorous manner. He carried his brand of ubuntu until the end – and will be sorely missed. As Geoff Budlender observed:

*Steve Ellmann was a fine human being – in a word, a mensch. He was respected and loved by many. We are all blessed to have had him in our lives.*

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<sup>16</sup> Specifically, Steve's article, *The Struggle for the Rule of Law in South Africa*, 60 N.Y. L. SCH. L. REV. 57 (2015/16) was recognized for the award.