# The Second Bram Fischer Memorial Lecture

by Chief Justice I Mahomed

The Bram Fischer Memorial Lecture is presented by the Legal Resources Centre to mark the life and work of Bram Fischer. The first lecture was delivered by President Nelson Mandela in 1995*. The second lecture was delivered by Chief Justice Ismail Mahomed at the House of Assembly, Cape Town, on 3 February 1998. It is published with the permission of the Legal Resources Centre.

JUST occasionally in the life of a people, history produces a citizen the impact of whose life continues long beyond his physical demise, to stimulate profound reflections on the complexity and the potential grandeur of our species and its unique need and capacity to formulate and to develop for itself a moral basis to regulate the interaction of its members *inter se* and between those members and the evolving environment which it inherits and generates.

Such a rare man was Bram Fischer. Born in 1908, within the very core of the political and legal establishment which was to rule the land of his birth throughout his life and for nearly twenty years after, he was said to be destined to reach the highest public office in that land, as Prime Minister if he had chosen a political career or as Chief Justice if he had confined himself to the practice of the law.

There was a formidable and auspicious constellation of circumstances which appeared to qualify him for and accelerate him to such a destiny. His ancestral roots were powerful and unalloyed – his grandfather the Prime Minister of the Free State, his father the Judge President – both legendary figures** in Afrikaner history. His intellectual endowment was towering, waltzing him to Oxford through a Rhodes Scholarship, enabling him as an advocate to sparkle among the very top of the largest Bar in the country with his intimidating skills as a civil jurist of distinction and a trial lawyer of great competence and dexterity. His professional reputation was enviable, winning the ungrudging respect of his colleagues who elected him year after year to assume the leadership of the Johannesburg Bar. His physical attributes were formidable, giving to him the tenacity and bounce to play a very skilful game of rugby and tennis at a very competitive level. His marriage was ideal, the love between him and Molly which produced Ruth, Ilse and Paul, itself a warm and wonderfully inspiring story of reciprocal caring and fidelity, of humility in celebration and fortitude in adversity.

*Chief Justice Ismail Mahomed*

And above all he was gifted with a personality which conquered all who had the privilege to know him. It had a rare appeal combining with awesome magic and subtle power, a dignity and a courtesy which were unfailing, an integrity which was unbending, a warmth and a gentility which were rich and infectious, reservoirs of courage and persistence which were sometimes even frightening to others, and a deep and abiding compassion for the condition of so much of humanity, oppressed by poverty and injustice and degraded by their awesome consequences.

But these rare, even exciting combination of gifts within Bram and the circumstances outside him with which he interacted, did not lead to the romantic fulfilment of the destiny which had been predicted for him. Bram did not become the Prime Minister or the Chief Justice of his country. That rich mysterious spark in the spirit of the human condition, which sometimes so intriguingly defies all predictions, set him on a course in irreconcilable collision with the laws of the land of his first love. He died in 1975 at the age of 67, not a Prime Minister, or a Chief Justice but a convicted prisoner, serving life imprisonment, his emaciated body riddled with incurable cancer, his professional claims publicly repudiated by his removal from the roll of advocates on the initiative of his own colleagues at the Bar.

There is a deep and abiding sadness about this tragedy which must transcend political differences. But beyond the intensely personal, the life of Bram Fischer, also raises important issues of legal philosophy and jurisprudence. In order to appreciate these questions it is necessary to examine reasons why according to Bram, he found himself in fundamental conflict with the law and why he eventually embarked on a course of conduct, which led to his imprisonment for life and to a destiny so dramatically different from the destiny which had, with so >

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* *See 1995 November* Consultus *160.*

** *His grandfather was Abraham Fischer, first prime minister of the Orange Free State Colony. His father, Percy Ulrich Fischer, was Judge President of the Orange Free State Provincial Division.*– Editor

much persuasive force, been predicted for him.

These reasons appear substantially from three documents for court written by Bram. In the first letter to counsel which was read to the court trying him for certain political offences, he sought to explain why he would not continue to appear before the court. He said:

> "I have not taken this step lightly. As you will no doubt understand, I have experienced great conflict between my desire to stay with my fellow accused and, on the other hand to try to continue the political work I believe to be essential. My decision was made only because I believe that it is the duty of every true opponent of this Government to remain in this country and to oppose its monstrous policy of apartheid with every means in its power. That is what I shall do for as long as I can.
>
> In brief, the reasons which have compelled me to take this step and which I wish you to communicate to the Court are the following:
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> – There are already over 2 500 political prisoners in our prisons. These men and women are not criminals but the staunchest opponents of apartheid.
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> – Cruel, discriminatory laws multiply each year, bitterness and hatred of the Government and its laws are growing daily.
>
> ...Unless this whole intolerable system is changed radically and rapidly, disaster must follow. Appalling bloodshed and civil war will become inevitable because, as long as there is oppression of a majority, such oppression will be fought with increasing hatred.
>
> To try to avoid this becomes a supreme duty...
>
> ...I can no longer serve justice in the way I have attempted to do during the past years. I can do it only in the way I have now chosen[1]..."

The second document is a letter written by Bram to oppose the application brought by the Society of Advocates to remove his name from the roll of advocates, while he remained underground within the country. He said:

> "...When an advocate does what I have done, his conduct is not determined by any disrespect for the law nor because he hopes to benefit personally by any 'offence' he may commit. On the contrary, it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that, whatever the consequences to himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to act otherwise would, for him, be immoral...[2]."

He went on to say that his protest against the laws which he found repugnant had to take

> "a sharper form - in an open defiance, whatever the personal consequences might be, of a process of law which has become a travesty of a civilized tradition..."

The third document is his speech at his trial after he had been recaptured following upon a prolonged period of underground political activity. He said:

> "...My Lord, when a man is on trial for his political beliefs and actions, two courses are open to him. He can either confess to his transgressions and plead for mercy, or he can justify his beliefs and explain why he has acted as he did. Were I to ask for forgiveness today, I would betray my cause. That course, my Lord, is not open to me. I believe that what I did was right, and I must therefore explain to your Lordship what my motives were; why I hold the beliefs that I do, and why I was compelled to act in accordance with them...
>
> ...I accept, my Lord, the general rule that for the protection of a society laws should be obeyed. But when the laws themselves become immoral, and require the citizen to take part in an organised system of oppression - if only by his silence and apathy - then I believe that a higher duty arises. This compels one to refuse to recognise such laws[3]"

## Law and morality

What these statements amount to is this: there must be a rational and purposive relationship between law and morality and particularly between law and justice. The law must have a morally defensible content. It is that which compels my fidelity to it. Your laws do not have that content. They are immoral. I am therefore not obliged to obey them. Indeed I am entitled to defy them with the object of causing other laws to be enacted which are ethically purposive and which can therefore properly compel my fidelity.

This is an intellectually and even emotionally provocative challenge which raises questions which are fundamental for serious lawyers everywhere, whatever be their political position about some of the ideological perspectives which propelled Bram Fischer in his life.

What indeed is the relationship between law and morality and law and justice? How are the imperatives of morality and justice properly identified for this purpose? Is the relationship between law and justice a permissive or a substantially necessary relationship? What if it is severed? Does law without justice retain its status as law? Does it justify disobedience at any point? Does it justify organized resistance? How substantial must be the severance to justify such resistance? How does civilisation best protect itself against exposure to the risks inherent in such conflicts?

The debates on such issues are both old and new, both philosophical and jurisprudential, sometimes both stimulating and frustrating. But they share one central premise, often articulated but sometimes unarticulated. It is this. Whatever be the eventual content of law, its objective must always be consistent with justice. Law does not constitute its own justification. Law cannot be built on law. It must be built on justice. In the words of Professor Ernest Barker in his seminal treatise on the *Principles of Social and Political Theory*[4]

> "The supreme sovereign which stands in the background of any politically organized community is justice: justice in the sense of that right order of human relations which gives to the greatest possible number of persons the greatest possible opportunity for the highest possible development of all the capacities of their personality."

Professor Barker is articulating a thesis which goes to the very root of the rationale for all law. It is the pursuit of justice which must in principle be the rationale for all law. The very real necessity for order and stability is not a competing rationale, it is simply an incident of justice; the means to ensure its pursuit fully and effectively and to guarantee its protection and enjoyment by its beneficiaries. The

pursuit of justice is an autonomous, sovereign and self-legitimizing justification for law. The pursuit of order is not. It has little independent value if it is not harnessed in the pursuit of justice to facilitate the conditions which are conducive to the realisation and development of the dignity and potential of every person. The submission, therefore that there must be a necessary and symbiotic relationship between law and justice sparkles in philosophical insights through the ages from Aristotle to Cicero through Grotius and Thomas Aquinas, and in modern times – through varying angles – in Mahatma Ghandi, Gustav Radbruch, Professor Lon Fuller of Harvard and Professor Ronald Dworkin of Oxford.

Indeed Fuller following Radbruch goes further. He makes a formidable case in support of the proposition that a purported law in conflict with the internal morality of the law is not a law all.[5] What does this mean? What is its practical relevance? Does it impact only philosophical or semantic perspectives? Not if regard is had to the approach of the German court after the end of the Second World War, in a case in which a wife had been indicted on a serious charge of causing the deprivation of the liberty of her husband during the period of Nazi rule.[6] In 1944 the husband, who was a German soldier, paid a short visit to the wife for a single day. He conveyed to her some strong disapproval of Hitler and the Nazi party. He had also expressed regret that the assassination attempt that year on Hitler's life had been unsuccessful. Shortly after he left home the wife saw an opportunity to get rid of him. She reported his remarks to the Nazi party. The result was a trial of the husband by a military tribunal. He was sentenced to death, but this was subsequently reduced to imprisonment.

After the defeat of the Nazi government, the wife was brought to trial for having caused the imprisonment of her husband. Her defence was that in making the remarks which he had done, her husband had committed a crime in terms of the law then in force. She had therefore acted lawfully by bringing a criminal to justice.

The court rejected that defence. It held that the Nazi law on which the wife relied offended the "sense of justice of all decent human beings". It was not a law at all.

There is strong support for this approach among lawyers following the naturalist temper in legal philosophy which has always insisted that a legitimate law must at least have that degree of minimum rationality and ethical content which is defensible in civilised society and that if it did not, it forfeited its status as law. On that approach many of the laws enacted to sustain the imperatives of apartheid, which were repugnant to the conscience of Bram Fischer, Nelson Mandela and Mahatma Gandhi among others when they were prosecuted in this country must, subject to jurisdictional issues, arguably have been vulnerable to serious attack, even without a written Constitution defining the parameters of the disciplines to which law

*Bram Fischer*

making must inherently be subject. It is an approach vigorously supported by Professor Fuller and Gustav Radbruch among others. They would argue that laws in this country made by a Parliament elected by a racial minority, such as those which caused the incarceration of many millions of black citizens for contravening Pass Laws which applied to no other group, laws which compelled the removal of huge and entire communities from their traditional homes to distant, alien and desolate areas of habitation on racial grounds alone and laws such as those which made it a criminal offence punishable by imprisonment for a person of one colour sharing deep emotional and spiritual bonds with a person of different colour to marry and nurture a loving family, forfeited any claim to recognition as laws at all, because they were so utterly repulsive to the moral conscience of all civilized communities.

In his famous address to the Harvard Law School in April 1957 Professor H L Hart[7] disagrees: supported by others with a more positivist temper he argues that this approach does not sufficiently separate what law *is* from what law *should be*, but he shares with equal vigour the important proposition that justice and morality are clearly relevant to the issue as to what law should be. This concession has one crucial consequence directly impacting on the challenge made to the law by Bram Fischer in court: If the rationale for law is justice and morality, defiance of a manifestly unjust or immoral but valid law, may still be morally perfectly possible.

The symbiotic and real relationship between law and morality therefore might become inescapable on either approach. Resistance to a manifestly unjust law may be justified on either basis. It is not a law at all because it is immoral or if it is, it cannot morally compel obedience to its commands. The same moral assessment becomes relevant in both propositions.

Because persistent or widespread disobedience on either ground might have serious implications for a defensible stability in society, it is necessary to examine the qualifications which must be inherent or necessary in both these propositions.

## Test for immorality

The most important qualification is this: The test for immorality on either basis must be objective and not subjective. The subjective opinion of one person – or even a group of persons – that a particular law is unjust or immoral would not suffice to render that law immoral or unjust enough to justify disobedience. It must be an opinion manifestly demonstrable in the judgment of reasonable men and women in the community at large. Moreover, the degree of immorality or injustice sanctioned by the impugned law, must be sufficiently serious to justify such disobedience in the judgment of such men and women and there must be no other elective means to secure its reversal. Were it otherwise, every citizen would be free to obey or disobey every law depending on his or her private perception about its morality or justice. The exercise of that kind of freedom would not only be >

potentially anarchic, but would itself be conducive to injustice and immorality because it would impermissibly invade the rights of others; it would fundamentally and unacceptably be subversive of the very foundations of a system upon which the defence of civilisation must rest both logistically and ideologically.

How is the objective test to be applied? How is the judgment of reasonable men and women in the community at large determined?

The extent of the support enjoyed for the claims of the dissenter in a particular society would clearly be relevant and important but not decisive: many of the aggressive decrees of the Third Reich aimed at a minority, might arguably have been supported by substantial groups, but that would not help to rescue their proper designation as evil and monstrous expressions of immorality and injustice, in the legitimate judgment of a caring civilisation, transcending parochial pathologies and informed by universally shared ethical values.

How is that judgment legitimately made? The philosophic answers to that question are complex and diverse, influenced by different perspectives concerning the proper role of our species on earth and its duties and obligations in relation to its own members and to its environment, its place in the cosmos, its spiritual condition and development and its existential challenges.

The jurisprudential, political and sociological answer is perhaps less complex: Every civilisation makes its judgment of what is moral and just through an evolving consensus of fundamental values. To quote Barker again:[8]

> "Justice is mediated by, or comes through the medium of, a process of social thought, which in the course of its operation produces a body of common conviction about the dictates of justice, backed by a common will or purpose of acting in the strength and under the guidance of that conviction. This product of social thought is mediated... by the State, in the sense that it undergoes a process of being declared and enforced by a legal association..."

Professor Barker must be correct in this conclusion. It is necessary however, to bear in mind that the relevant search is to identify the "common conviction" on the fundamental values of morality and justice informing the civilization ad not merely on the *ad hoc* responses which a particular society might favour as expressions of those values. I think it is also necessary to insist that the conditions under which the "process of social thought" operates and matures into "a common conviction about the dictates of justice", are free and open.

## Dictates of justice

In modern society at least four conditions must operate in sufficient measure to give legitimacy to its conclusions: Firstly, every citizen must have a free and unfettered right to make an informed input into the evolution and maturation of any emerging common conviction on justice, and the content of moral values. This involves not only the formal opportunity for citizens to vote for and to be voted into public office, but the right vigorously and fearlessly to express themselves, to dissent from, to qualify and to oppose any perceived orthodoxy or direction, to organise and to persuade others to share their perceptions and to have access to the information necessary to make that right meaningful and effective. The content of Democracy must not only be sufficiently strong to allow governments to be voted out of power when they deserve to be, but sufficiently participatory, active and alive to influence the quality and depth of moral values impacting upon the direction and richness of society.

Secondly, when a manifest common conviction, on justice or morality, legitimately shared and identified by a society, is clearly invaded by a law, rule or direction there must be an independent mechanism to negate its command when it is properly challenged. This power must vest in an independent Judiciary, appointed by an objective and independent process, imbued with a temper which is objective and independent and endowed with the skills necessary to assess the cogency of the challenge made to it, without fear or favour. Threaten that independence and you threaten the capacity of the civilization it mediates to correct its own pathology. Imperil that independence and you imperil the protection of the values upon which that civilization is premised and its capacity to defend its fidelity to those values. In making its assessment, the court is assisted by the specific but often by the necessarily broad strokes of a written constitution where there is one, by the increasingly common culture of human rights which is beginning to manifest itself internationally, by the heritage of the best in the common law and by the rich traditions of literature and poetry and learning from different strains in civilization as they come to express the shared nuances of an increasingly shrinking world of greater togetherness and universal fraternity, facilitated by science, telecommunication and education.

Thirdly, substantial parts of the population must be able to identify with such issues and to perceive their crucial relevance in their lives. They must feel the need to and be empowered to make effective inputs into the evolution and identification of common convictions. They must be able to perceive at least the real prospect of escape from the disempowering combination of obscene disparities in living standards, by degrading poverty, by pervasive illiteracy, by widespread homelessness, and by the crippling disease which stalks so much of Africa and other parts of the world.

Fourthly, even deeply and commonly held convictions impacting on values on justice and morality maturing in consequence of a long and legitimate process of social thought evolved under acceptable conditions of democratic participation, are themselves nevertheless open to review and maturation by the penetration of new frontiers in science and technology and developing spiritual and philosophical perspectives. The orthodoxy of yesterday often becomes the heresy of tomorrow. It is therefore necessary that even in the case of very deeply held and common convictions about what is moral or immoral, just or unjust, the voice of the dissident, the unorthodox and even the apparent maverick must not be suppressed.

Where does all this leave us? Does it in principle concede large and protean areas of imperfection in the capacity of the human condition to respond with confidence and finality to the intellectual,

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the GCB to make available qualified advocates to perform this task. We have no doubt in our minds that the constituent Bars and the GCB can rise to this challenge.

## Restructuring the Bar

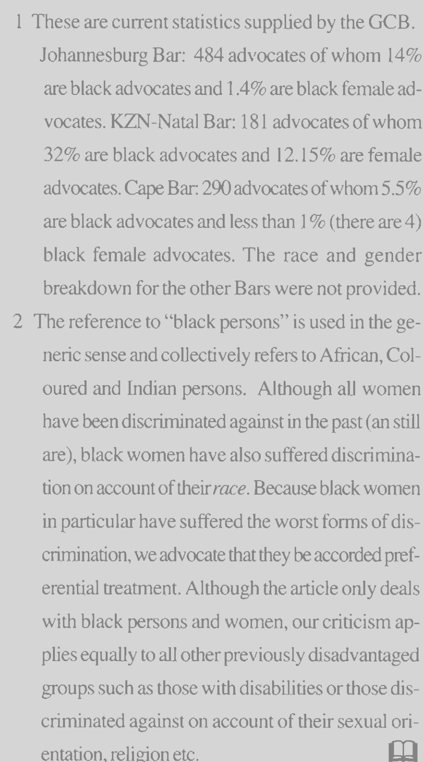
We are of the view, however, that these challenges will not be (successfully) met by the constituent Bars and the GCB unless the Bar Councils and the GCB are restructured. Quite simply, the various Bar Councils and the GCB are overwhelmingly white and male and, quite frankly, it is very difficult to imagine their effectively representing the interests of women and black persons. The best (and only) solution is that black persons and women be allowed to represent and promote themselves.

We propose that the constituent Bars and the GCB effect the appropriate constitutional amendments as soon as possible to provide for significant direct representation of black persons and women on the respective Bar Councils and the GCB. Related to the issue under discussion is the efficiency of the Bar Council system. The management of the Bar vests in the Bar Councils. What is of grave concern to us is that the Bar Council comprises elected members of the Bar who have the enormous responsibility of running and managing a very important institution purely on a part-time basis. This is unacceptable. The Bar Council needs to be restructured along more professional and business lines. In this regard, we propose that a starting point would be the appointment of a full-time, suitably-qualified chief executive officer (preferably a black person or a woman) together with the appointment of professional staff, to oversee the operational side of the Bar Council.

A restructured Bar Council should purely be a policy-making body.

## Conclusion

Space does not allow us to expand and elaborate upon some of our ideas which many readers may find somewhat controversial. We feel, however, that we wish to make a meaningful contribution to the debate, a debate which needs to come to some conclusion as soon as possible. Concrete action must be taken so that we can begin to meet the challenges laid down by our Constitution to make the Bar and the Bench truly representative of the racial and gender composition of our country.



### Footnotes

1 These are current statistics supplied by the GCB. Johannesburg Bar: 484 advocates of whom 14% are black advocates and 1.4% are black female advocates. KZN-Natal Bar: 181 advocates of whom 32% are black advocates and 12.15% are female advocates. Cape Bar: 290 advocates of whom 5.5% are black advocates and less than 1% (there are 4) black female advocates. The race and gender breakdown for the other Bars were not provided.

2 The reference to "black persons" is used in the generic sense and collectively refers to African, Coloured and Indian persons. Although all women have been discriminated against in the past (an still are), black women have also suffered discrimination on account of their *race*. Because black women in particular have suffered the worst forms of discrimination, we advocate that they be accorded preferential treatment. Although the article only deals with black persons and women, our criticism applies equally to all other previously disadvantaged groups such as those with disabilities or those discriminated against on account of their sexual orientation, religion etc.

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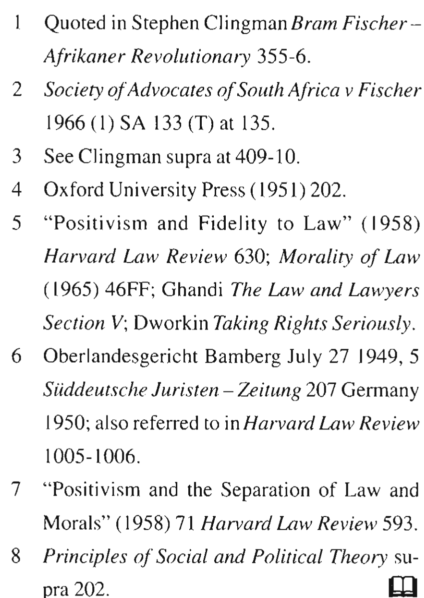
jurisprudential, moral and arguably even spiritual challenges provoked by what Bram Fischer did and said and by what different parts of organised society effectively said and did to him? Undeniably.

But that admission should not be any source for despair. It was not for Bram, during his quite remarkable life as a jurist, a thinker and an activist deeply concerned with the destiny of his country and its people. Imperfection in a very necessary and significant sense is inherent in the human condition; in the growth which comes from the exercise of our freedom; in the very quality and meaning of that freedom which necessarily involves a choice of potential alternatives and not staticity or finality and perhaps in the interface between the finite and the infinite. Indeed it is precisely this consciousness of imperfection, and the enjoyment of a creative freedom which propels the pursuit of perfection, giving energy and romance to the pursuer, and meaning to the pursuit as new vistas of beauty and sparkling mystery unfold themselves in the wonder and the excitement of the unfinished symphony of life.

But the excitement of this pursuit into the future is immeasurably enhanced by the truths absorbed from the past and the present. For lawyers these include the insistence, at all times, that the attainment of justice must be the rationale for all law; that law cannot be distanced from justice and morality without losing its claim to legitimacy; that the ethical objectives of the law contain the life blood of a nation; that justice must not only be procedurally fair but substantially fair in its execution; that the law must be seen to be fair in its impact on the life of the humblest citizen in search of protection against injustice; that the law is accessible, intelligible, visible and affordable; and that any retreat from these truths imperils the very existence and status of a defensible civilization, first by corrosively destroying within it the source of the energy which sustains it and second by provoking disdain, disorder and rebellion from those it seeks to discipline.



### End notes

1 Quoted in Stephen Clingman *Bram Fischer – Afrikaner Revolutionary* 355-6.

2 *Society of Advocates of South Africa v Fischer* 1966 (1) SA 133 (T) at 135.

3 See Clingman supra at 409-10.

4 Oxford University Press (1951) 202.

5 "Positivism and Fidelity to Law" (1958) *Harvard Law Review* 630; *Morality of Law* (1965) 46FF; Ghandi *The Law and Lawyers Section V*; Dworkin *Taking Rights Seriously*.

6 Oberlandesgericht Bamberg July 27 1949, 5 *Süddeutsche Juristen – Zeitung* 207 Germany 1950; also referred to in *Harvard Law Review* 1005-1006.

7 "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593.

8 *Principles of Social and Political Theory* supra 202.