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THE INAUGURAL BRAM FISCHER MEMORIAL LECTURE, 2013

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South Africa has been endowed with towering and inspirational figures in her history. In many respects many of these represent the conflictual, race and economic colonial history of the country. One might therefore be excused for taking a partial view of that history depending on one's social and political orientation. For good or ill, for better or for worse, they have shaped the history of this land. Among such figures, surely, and with the benefit of history, the name of Advocate Bram Fischer is writ large.

Bram Fischer was a lawyer. He came from a family with deep roots in Afrikaner nationalism, but also lawyers and politicians. It always strikes me as curious that lawyers have been found among those who have championed generally unpopular causes, and have been prominent in popular struggles. At one level it is peculiar because the legal profession is very conservative. It is bounded by formality, decorum and tradition. It has certain bottom lines that are hardly ever questioned, and by and large, advances by a process of pragmatism and, as officers of the court, deference to authority. And yet lawyers are trained in the art of argument, and logic and persuasion. They are also cultured to take a stand with their client, even if unpopular or a hopeless case. To that extent they get to understand the people or causes they represent. They identify with who they are (although some of us were trained to take an emotional distance from one's clients as litigants). It has been said that he was meticulous in reading his briefs, preparing his opinions, and managing his cases. The best lawyers are those who pay close attention to detail. One has to be good at what one does.

Bram Fischer was steeped in the social, political and intellectual climate of the Orange Free State. And yet he seems to have had the privilege of a liberal, though, Afrikaner upbringing: Grey College and university as well as Oxford. He was already a successful lawyer in the Johannesburg Bar when he formally joined the Communist Party giving effect to his intellectual persuasion throughout his time in Europe, having indulged upon his return in the non-racial liberal circles of Johannesburg, and perhaps catapulted into active and open identification with the Communist Party by the international developments. Whatever may have been the impetus it would have taken a great deal of intellectual courage and independence of mind to become a communist and contend with family and colleagues

at the Bar and by now at Wits where he had taken a teaching position, as well as the unknown effect such identification would have had on his practice and social circles.

Of course, many of us have come to know Bram Fischer as the lead counsel in the Rivonia Trial. South Africans remember so well the courage and inspiration of Nelson Mandela's statement from the dock, and the fact that the Rivonia Trialists were facing a death sentence. Not many of us, however, are aware that it would have taken enormous courage for Bram Fischer SC to defend his comrades knowing that he too may be cited by any number of state witnesses. I suggest, however, that it was more than mere courage or bravado. It was transformative in that it was restructuring the rules of the game, so that counsel and client were identified with a common cause. It was already becoming evident that this consummate defence counsel was set to challenge the veneer of justice that the South African legal system sought to present, and expose what Nelson Mandela castigated as a "white man's court."

A brief two years later Fischer, now the accused in his own trial was to estreat bail and go underground before he was arrested some nine months later. He had in fact honoured his undertaking to return to stand trial after being allowed to travel to London for a case before the Privy Council. It was for him a matter of honour and conviction. On this occasion, however, he informed the court through his counsel that he would not appear, and that that was not out of "disrespect" for the court. He vowed to continue his struggle against apartheid. He then states that he felt duty bound to take a stand "as an Afrikaner, because it is largely the representative of my fellow Afrikaners who have been responsible for the worst of these discriminatory laws." Significantly, Fischer then advised the court "I can no longer serve justice in the way I have attempted to do during the past thirty years. I can do it only in the way that I have now chosen." That, of course, is rather cryptic. How would life underground serve the cause of justice? I suggest that he meant that in two ways. First, that by undermining the justice claims of the system he had been part of for so long, and declaring that in fact it could not produce any real justice, he attacking its claims to legitimacy. Secondly, the system had to be overthrown because the justice system could not reform itself. He was therefore resolved to commit himself to the overthrow of the apartheid system. At his own trial in 1966, Bram Fischer read a statement from the dock. In it he averred that he accepted the general principle that law should be obeyed "But when the laws themselves become immoral, and require the citizen to take part in an organized system of oppression – if only by his silence and apathy – then I believe that a higher duty arises. This compels one to refuse to recognize such laws."

Of course, Fischer was referring here to a time-honoured moral principle, and one that had been raised by conscientious objectors in Nazi Germany like Dietrich Bonhoeffer and Pastor Niemoller. But it is not a principle that is a defence in law, and Fischer realized that, hence he did not plead, and

neither did he take the witness stand. He would not compromise his principles by denying the validity of his actions and political convictions. In other words he declined to participate in his own conviction. He also went further than that. He stated that he was acting out of duty. It was out of duty as an Afrikaner; it was out of duty as a member of the legal profession; and it was out of duty as a moral human being. This sense of duty must always guide the conscience of moral agents.

Out of that all-too-brief outline of the Bram Fischer episode in our national life, I propose to discuss the transformation agenda for the justice system in South Africa based on the convictions that Bram Fischer so boldly outlined, suffered and died for. I have noted above the place of revolutionary principles, the legitimacy and credibility of the legal system and the mind of the lawyer. I do not wish to be understood as suggesting that the current situation is akin to that which obtained under apartheid. Nothing could be further from the truth. We now have a Constitution that is broadly acknowledged with pride by the great majority of South Africans. We now have a judiciary, especially the Constitutional Court, that is the pride of our land.

I am not one of those who wear too comfortably the mantra that the Constitution is a “compromise” document. That is invariably appealed to in order to de-legitimise aspects of our constitutionality. That cannot be justified. I believe that the entire Constitution is representative of the convictions by all those who negotiated that it reflected the fundamental interests of the people of South Africa. It is an ideal document in that it reflects the character of our society and is designed to be the fundamental law for all South Africans. Any suggestion to the contrary would end up with a constitution with no more legitimacy to some than the apartheid system had. The Constitution has avoided that. It has achieved, if you like, that “bridge” that Fischer referred to in his Statement from the Dock, between black and white that legitimizes “by negotiation, and not by force of arms” the destinies of us all.

Much has been made in recent times of the imperative for transformation in our judicial system. Granted this has to do with the duty for judges to reflect the racial, gender, disability, geographic and class demographics of our country. Of course, this rarely gets expressed in the manner I have done. In fact the Constitution is very sparse in this regard referring as it does only to race and gender revealing, I suggest, the bias and proclivities of the negotiators and drafters of the Constitution (s.174(2)). The rational for this should not be hard to understand. It is that there should never again be a repeat of the Mandela phenomenon in the courts system in our country, where clients, or accused or litigants are alienated from the proceedings, or that the presiding officers do not engender

confidence or cause suspicion from the public, or have no understanding of the experience of justice from the "other" side. This would invariably cause the legitimacy of the courts to be held suspect.

But "transformation" can usually be expressed in a self-serving manner, to advance particular or hegemonic interests. Unfortunately the manner in which the JSC is structured lends itself to that view of the prevailing or dominant interests being subscribed to by the dominant political elite in our country. One would expect that, conscious of this, the manner in which the JSC is chaired should be engaging and inclusive enabling those of ostensible minority opinions to be heard empathetically and with understanding. This does not just refer to the question of race, it applies even more to women and people with disability, and it also entails class experiences as well. In other words transformation must begin with the judiciary itself in the manner in which it conducts its affairs.

The second consideration is that it is important to recall that "transformation" does not just mean a change from one state to another. It actually has a deeper meaning, that is, to change the nature of being almost to the point of being unrecognizable from the past. This tells me that one must go beyond and drill below the surface beyond the obvious and visible. For example, race is important and it is one category but it is not and should not be the dominant category for ever. We are now nearly 20 years since the judicial transformation system was introduced. And yet, there are cries about the lack of women, the disabled, and I add, people of different sexual orientations in our judicial system. It is always touching to hear the stories of some of our judges like former Chief Justice Pius Langa, and indeed the current Chief Justice, who came from poor homes and struggled to make their way to university. One hardly ever hears how class-consciousness, for example translates in the manner in which judges are trained to listen, hear and judge. Precisely, how does a court presided over by a woman make a difference in the texture of justice –seeking and application?

But there is a third consideration, again, one which one hardly hears about. It is, I believe, something that Bram Fischer must have wrestled with for a long time. It is whether the system itself does not militate against effective justice. For him it was the difference between form and substance. The form was appropriate in address, decorum and respect. The substance was in the laws that were passed and the court believed it to be its duty to reinforce. I suggest that the principles of *stare decisis,* that the previous decisions of the courts must be upheld, or that the decisions of the higher courts are binding on the lower courts. In many cases our courts are bound to apply the Constitution, taking account their inherent powers to "develop the common law, taking into account the interests of justice…" (s.173). Moreover, and to what extent, is the South African legal system bonded by accretions of a legal system of Roman Dutch Law, English law, and common law that have been declared normative at the expense of more indigenous systems of expression of law? Yes, when one reviews the judicial decision, how many instances do our courts examine more indigenous systems of

justice making? I am reminded about something that is always the pride of Justice Albie Sachs about the Constitutional Court Building in Braamfontein. It is that it dispenses justice under the tree, meaning centrality of justice in the consciousness of the community, and its openness and invitational character. But is that indeed so? I do not mean to an un critical extent, but I mean to grow and develop the totality of the legal systems available to our rainbow nation. It makes no sense to me in a progressive legal system for us to give oxygen to a discredited system of traditional courts instead of integrating indigenous law into the means of judicature in our jurisprudence rather than to marginalise indigenous law. My sense is that if one walked into any of our courts what strikes one is how European and foreign our legal system still is, how alienating to many, and how inaccessible. I therefore suggest that transformation must examine the wider perspectives that Bram Fischer came towards the end of his active legal practice. For him this insight may have been occasioned by the determination of his colleagues in the Johannesburg Bar to disbar him, and of the Justice Minister to regulate the admission of advocates, and exclude from admission communists and any convicted under the Suppression of Communism Act.

It is my contention that the quality of law in a country depends on the intellectual and political environment that obtains to enable aggressive, independent lawyers to defend the best interests of the people. This means that the lawyer must earn the trust of the clients, as if he/she has no other client to think about. Karin van Marle ponders this in her essay, "Lives of Action, Thinking and Revolt: A Feminist Call for Politics Becoming in post Apartheid South Africa"[1]. She suggests that there is a view of constitutionalism that lends itself to apathy and paralysis as if the Constitution by itself solved all matters of contention by mere fiat. She asks the question pertinently: "to what extent, if at all, transformation, in the sense of radical restructuring of not only the system but of subjects themselves, has been put in motion over the past decade? She senses that what we may have lost, that was surely there in the struggle, is that anticipation and working towards bringing into being something new continuously. In other words in contrast to Christof Heyns' paradigm of human rights as struggle, she posits Lourens du Plessis' notion of the Constitution as a monument, memorial and promise. It suggests and reminds one to continuously struggle for justice even if it is with the Constitution as armoury.

But for van Marle there is a more fundamental issue that can be derived from social scientists like Hannah Arendt in her book *The Human Condition* and her interpretation by Julia Kristeva. She takes the view from Arendt of the centrality of *life* in the human condition, life at the centre of thought and action. Life is fulfilled to the extent that "it never ceases to inquire into both meaning and action." This

[1] Roux W & van Marle K: Post Apartheid Fragments: Law Politics and Critique, 2007, Unisa Press34-58.

search for fulfilment, the intertwining of thought and action, must result in revolt. Revolt is the freedom to call into question, to demand and take into account, and to lay out alternatives to appropriate action. When things that had become normal or atrophied are called into question, they have the possibility of revival and growth; but they may also face the prospect of dying for irrelevance, and so they should. “Revolt” and “revolution” therefore is suggestive of turning over and over. She expresses this as “revolt refers to a state of permanent questioning, of transformation change, an endless probing of appearances. In summary, van Marle argues that democracy must guard against, “a complacent society where political action, thought eternal questioning and contestation are absent and replaced by an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental.” While it may be possible to regulate transformation by law at the bureaucratic level, it is nearly impossible to shift transformative thinking about law and the systems of justice at the level where substantial shifts in the nature of the law and how it operates is affected.

I submit that ironically, we may well be in the grip of the totalizing power of the state and party in South Africa today, where the power of the state is centralized in the party to the extent that there is no difference between state and party, and where there is a fusion between the public and the private realm, And so it makes sense for state resources to be utilized to make the private residence of the head of state more lavish and comfortable at state expense, and where citizens should not interrogate state decisions about war and peace, as in the case of the deployment of South African troops in foreign lands, and where it does not matter that the Head of State packs independent state institutions with his own lackeys. Anthony Court in his study of Hannah Arendt expresses this anti-constitutional dilemma this way:

> …rather than ‘politicising’ the totality of life forms, totalitarianism in fact effects a radical de-politicisation by way of isolating the individual, whose only connection to a common world is afforded by the totalitarian movement. Accordingly, the individual is cast into a state of intolerable ‘loneliness’. The immensity of power generated by totalitarian organization derives from the internalization of the principle of total domination and the reduction of human relations to acts of ideological compulsion[2].

I suggest that when public power fails to acknowledge citizens as bearers of rights and that power in a constitutional democracy is mediated by the people’s critical consciousness as a right and a duty. The political discourse in our country in recent times has elevated the question of “innocent until proven so” in cases where senior politicians have been accused of corruption, and the Rule of Law has been

[2] HANNAH ARENDT’S RESPONSE TO THE CRISIS OF HER TIMES, 2008; SAVUSA Series, 263.

cited in a self-serving and facetious manner. Well, it may be that is a principle embedded in the Rule of Law. However, besides the Rule of Law, there is the moral principle as to whether one can effectively exercise one's functions at a time when doubt is expressed about one's integrity. Is it not the case that the holders of public office should never lend themselves in a situation where trust, confidence and integrity is put under question.

The World Justice Project, states the principles of the Rule of Law as follows:

1. The government is held accountable under the law;
2. The laws are clear, and open, accessible, applied evenly, and protect fundamental rights, including security of persons and property;
3. The process by which laws are enacted, administered and enforced is accessible, fair and efficient;
4. Justice is delivered timely by competent, ethical and independent representatives… and reflects the make-up of the community they serve.

These principles have been incorporated in our Bill of Rights and elaborated upon by the Constitutional Court and the SCA. Of course, these were principles on the basis of which it was easy to criticize the apartheid system. More recently it has been held by the late Chief Justice Arthur Chaskalson, reiterating principles set out by the United Nations and ICJ, that the independence of the judiciary presupposes the independence of the legal profession from control by the state. And so we should critically assess the extent to which as a nation in a constitutional democracy we are assiduous in upholding the Rule especially where our court rolls are so overburdened that it takes a long time, sometimes many years for criminal cases, especially to be concluded. What do we say to the phenomenon of judges delaying finalisation of cases by their inability to complete their reserved judgments; or the incompetence of our prosecutorial system to the extent that the murderers of Andries Tatane are acquitted merely because the case was bungled? What about the bulging prison and detention system which are more than 100% over capacity; or the fact that we have too many awaiting trial prisoners, many for as long as four years it has been reported, and too many for the simple reason that although bail has been granted they are too poor to pay the R250,00, while others are denied bail because they are reportedly of no fixed abode. The system militates against the poor to an adverse degree, and that in the new South Africa! Justice delayed is justice denied. Indeed, the Chief Justice has acknowledged this nefarious situation. One hopes that even as society clamours for no tolerance against crime, the human decency and the values of our Constitution will never be compromised.

We owe to developments in India the concept of judicial activism. I shall not attempt here to delve deeply into this concept which too many judicial purists is controversial. I suggest it here as a means of considering how the transformation of our jurisprudence as well as the processes and procedures accompanying it can be opened up, made more accessible and accountable, and reflect more truly the community's sense of justice at whatever level the parties approach the court. Judicial activism has been thought to have as its downside the court's intrusion into other spheres of government and as such suborn the democratic processes In a Preface to the book by Prof SP Sathe JUDICIAL ACTIVISM IN INDIA, Prof Upendra Baxi of Warwick University observes that Judicial activism causes discomfort to lawyers because it brings about indeterminacy and fails to settle matters of law. The reason being that judicial activism has the freedom to judge each case not just by its legal merits but also in its social and political contexts. And yet Baxi argues that that may be its strength because this inherent "undecidability" constitutes the mode by which the telling of stories, and the openness to definitions and redefinitions. He goes on to say "If true, this 'truth' subverts the model of an either/or choice: narratives about judicial activism de-privilege any 'right' way of describing, let alone defining its basic features and processes" (2007:xii). This enables what van Marle (2008:48) features in her analysis the acknowledgement and development of narratives of freedom and revolt that are told, experienced and shared. It is those narratives that judicial activism privileges and does not suppress. By so doing the narratives of the under-side receive empowerment by being received and listened to. Therefore says Baxi "judicial activism presents stories of both complicity with dominant power formations and ways of insurrection."

I do not have space or time to outline more fully the applications or lack of it of judicial activism in the South African jurisprudence. What is critical to bear in mind though is the conception that judicial activism is driven by the pursuit of substantive justice and values. Of course this is tricky because of the subjectivity this allows. It is tricky because in truth every judicial officer need not be unaware of some of the subjective biases that come into the judicial process, and at the same time their ability to keep those in check in the interests of a just and fair adjudication.

Sathe, however, goes a step further. He argues that judicial activism is "counter majoritarian" in that it starts from the position of bias for the poor, under-privileged and marginalized. He argues that judicial activism in favour of the powerful is unnecessary because the powerful have the means to assert their hegemony in the social and political system in any event. He reckons that it is not just unnecessary but "counter-revolutionary and inimical to social change to allow the power of the dominant socio-political forces to determine judicial outcomes (2002:281). This is how he expresses it:

"If judicial activism is to be conceptualized as interpretation of the law or the Constitution from the perspective of not only law, but justice, any interpretation that tends to perpetuate the existing class

domination is negative judicial activism and any interpretation that expands the rights of the disadvantaged sections as against the dominant sections or the individual against the State is positive judicial activism."

While it may be argued that Sathe perhaps overstates the case or the circumstances in India are different from our own, the subtle point though is that the judiciary has to be freed to think laterally and at depth. Second, that the judiciary must be conscious of social dynamics that underlie the matters that come before court, and finally that the court be freed from the constraints at times of precedent. In any event one should never assume that there is a suggestion here of unrestrained subjectivity and irrationality. What is of value is that the court puts itself at the service of people by making the judicial process intelligible to the ordinary people, promotes access by removing the aura and veneer of respectability and addresses alienation in terms of class, race and gender.

Sathe explains that the Supreme Court of India has done much to restore confidence in the judiciary, as the main educator on democracy and constitutionalism, about the democratic culture, and it is considered to be more representative of the popular consensus in matters of values. It sought, in the words of Dr BR Ambedkar, himself a Dalit and the main architect of the Indian Constitution; it addresses the contradiction prevalent in society between the old order and the difficult birth of the new.

I make this example only to say that in truth much has been done in our country to make the courts accessible and affordable. The works of the Legal Aid and Justice Centres, and the tradition of pro bono appearances by advocates remains a critical instrument in making justice accessible. Nonetheless it remains true that our court system, and its rules and procedures are very complex and unintelligible to the ordinary persons, with the effect that justice is only likely to be accessed by those who have the privilege of legal representation. Even the amicus system is dominated by legal NGOs and activist organisations who themselves are professional lawyers. One does not wish to undervalue the role of public interest law in advancing our democracy as independent and responsible citizens like the LRC, Section 27 et al - and thereby shine the spotlight on breaches of governance. One would like to believe that there could be a system that facilitated a judicious hearing of concerned citizens. The Constitution has also made possible class action litigation that would assist litigants with a common cause of action to approach the court. There is more to access to justice than is often made of.

As I draw this to a close, I observe in passing that Bram Fischer does not appear to have a view of law as in Marxist Theory. He was, I note, a consummate lawyer. He moved easily, it would seem, among his bourgeois colleagues and earned the respect even of those who passionately distrusted communism. His article on threats to the legal profession, and indeed, his statement from the dock was devoid of the rhetoric of a Marxist ideologue. I have no idea of his ideas of the place of law in his conception of historical materialism, or the withering away of the state. He articulated that law was indeed a mechanism for the advancement of a view of society that he strongly resisted. Strange for a Marxist though he appeared to be comfortable with the rule of law and human rights. He believed that such was necessary to mediate a society of difference. Unlike Marxist theory of law he held the belief that ultimately law would emerge out of a negotiated settlement, and thus a 'consensus' view of law held promise. Advocate Fischer was therefore a consummate lawyer, with a critical approach to law, who did his best to extract from an unjust legal system the very best for his clients. By the end he had lost faith in the capacity of the law to overcome apartheid structures that were inherently unjust.

And yet he might have been the champion of critical legal theory in one or another of its versions. For one thing the view articulated from India above reflects a version of CRT. Critical legal theory challenges the view that law is a system that is coherent, uniform. In truth law in its social application must remain uncertain, ambiguous at times and expresses or re-presents the societal power relations. To apply the Gramscian "hegemonic consciousness", one wonders, indeed, whether and to what extent in South Africa we have such drivers that constitute a "common sense" approach to law. Perhaps that is what the Constitutional Court, certainly under Arthur Chaskalson, appeared to be advancing.

I shall not spend too much time setting out how I believe that some of the law-making of our time seems hell-bent to undermine so many of these principles that would have promised a transformatory system of law. The sneaky resurrection of the Key Points Act from the apartheid law book, or the recently passed Protection of State Information Bill, or the Traditional Courts Bill, and elements of the Legal Practice Bill now making its way through parliament, are all suggestive of a conservative, reactionary manner of law making that is incompatible, I suggest, with constitutional norms. With it, there are also signs that police management and practice may well show signs of an unreformed securocratic system we thought we had buried with apartheid. I flag these matters without debating them extensively because they bear reflecting upon in terms of the view I take of the law in this paper.

And yet it will be hard to suppress totally the "argumentative" democracy ideals that Amartya Sen refers to. This is the idea that there can be no meta-narrative that is totalizing of the South African consciousness. These narratives of struggle and resistance and revolt will be hard to suppress for ever as we would learn from the dogged resistance to apartheid that Bram Fischer so gloriously

epitomized. Instead the South Africa identity post apartheid is under construction. There have been episodes, now sadly past, when we were confident that that common nationhood was a distinct possibility. This means that our common identity will become a product of continuous struggle, a struggle of ideas and dogged assertions, with a foundation on the Constitution.

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