



# BRAM FISCHER MEMORIAL LECTURE



## **Fifth Bram Fischer Lecture - Justice Pius Langa (2007)**

I would like to begin with a story...which you know very well. It is the story of the emperor who had a particular affinity for fine clothing. He wore the most expensive and rare garments on earth. One day he was approached by this mysterious tailor who claimed that he could make him the most beautiful and extraordinary garment ever. Of course the emperor fell for this, particularly the part promising him that this stunningly beautiful garment would be visible to only the most intelligent of people. When the robes were ready the emperor organised a grand parade to show off his new clothes. The emperor's advisors were of course full of praise as none of them wanted to be thought of as less than intelligent. And so on the great day, with his subjects lining the streets in droves to see his imperial highness in his new clothes, he marched down the street to much applause and apparent admiration. So when the small boy shouted the truth that the emperor had no clothes on, he was arrested, put in jail and later died there.

What does this classic fairytale have to do with Bram Fischer? For purposes of my speech, the tale has relevance at two levels. The first is the leadership level - how much more damning of a leader can one be than to say of him or her that the emperor has no clothes! It implies that the leader is vain, and listens only to the advice he/she wants to hear and, as a result is on a downward slide. Presumably, there was no lack of an admiring audience when another emperor, Nero, was fiddling while Rome was burning. These are leaders who become adept at listening to themselves, and turning a blind eye or a deaf ear at those who tell them bad news. They become equally impervious to the suffering of their subjects, because pain is bad news and imposes obligations these leaders would prefer to ignore. What they want to hear is praise, adoration and endless flattery. In that euphoric, unreal atmosphere, the observations of a mere small boy would go unnoticed. To use the words of a former apartheid Cabinet Minister, the plight of those who are desperate and who struggle desperately merely to survive leaves them cold.

The second level of relevance relates to the rest of us. It speaks to a susceptibility to conform, to submit to peer pressure, to populism, to political correctness and to a reluctance to think for one's self. I am referring to the lack of courage to say or do the unpopular thing, to follow the dictates of our conscience. The favoured choice is the safer route to do nothing ourselves but to keep hoping that others will do for us what we fear to do for ourselves: we accordingly wait for the small boy to emerge from the shadows and to point out the obvious: that the emperor has no clothes!

There is no doubt that the world, and this country in particular, are in dire need of men and women of courage who follow the dictates of their conscience. South Africa is a young country on the democratic road and can only benefit from having all constructive views not



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being withheld, but being freely expressed. We started well when thirteen years ago we adopted a Bill of Rights which, among other things promotes and protects freedom of expression and of thought. These are freedoms which the many sons and daughters of this land made enormous sacrifices for. We should therefore ensure that those who have something to say, albeit different and contrary to what the majority espouse, have the space to express themselves.

Bram Fischer, lived a life of courage and had an instinctive will to do what he believed in; that is what set him apart from many in his generation. His refusal to conform because of his convictions pitted him against both his Afrikaner heritage and his profession as a lawyer. He chose to speak his mind and to follow his conscience, regardless of the cost to himself. Today we are able to say that his life and activities were central in the creation of the democracy we cherish today.

Bram Fischer dared to be different. The son of a judge president of the Free State and the grandson of a former Prime Minister of the Orange River Colony, he was destined from birth to join the ranks of the Afrikaner nationalist elite. Both his forebears were fervent Afrikaner nationalists. But Bram's family, like his life, was not that simple. Although they became part of the establishment, both his father and grandfather were rebels in their own right. His grandfather fought against the British in the South African War. His father, at that time an advocate, represented the Afrikaner rebels who refused to fight for the British during World War I. Despite Bram's father's efforts, the rebels were convicted of treason and sent to gaol. The episode caused the Fischer family great financial and social hardship but his father never relented in his support for the rebels and regularly took the young Bram to visit them in prison.

With the coming to power of Afrikaner nationalism, the need for rebellion seemed a thing of the past. Indeed, for much of his early life Bram was headed down the road of privilege and status. At one stage early in his University career he believed in segregation and found it difficult to touch the hand of a black man in friendship. He recounted an important moment in his life when he gave a lift to an old ANC leader. Bram argued with the man that segregation was the only means to prevent friction between different races. The ANC leader disagreed and told Bram, in words that echo Harlan J's dissent in *Plessy v Ferguson* that:

If you place the races of one country in two camps and cut off contact between them, those in each camp will begin to forget that those in the other are ordinary human beings, that each lives and laughs the same way, that each experiences joy or sorrow, pride or



humiliation for the same reasons. Thereby each becomes suspicious of the other and each eventually fears the other which is the basis of all racism.

This encounter, together with his study in Oxford and his travels in the Soviet Union convinced him that Apartheid was indefensible. He then became embroiled in the struggle. He acted on many occasions for struggle activists including at the treason trial and Rivonia trial. But his involvement with the struggle went much deeper than mere representation. He was part of the struggle; he was present at the Rivonia meetings and was part of the group that took the decision to resort to an armed struggle. He was very reluctant to be part of the defence team at the Rivonia trial because of his intimate knowledge of and involvement with the alleged treason. Yet his dedication to the cause outweighed his reservations. He always felt there was an additional duty on him because he was an Afrikaner and believed that 'at least one Afrikaner should publicly identify himself with the plight of the people.'

We see him rebelling against the dictates of the legal profession. Always a believer in the rule of law Bram however questioned adherence to that rule when the results were so obviously unjust. He defied the rule of law in a number of ways. During the Rivonia Trial he used his access to the evidence to inform the remaining Umkhonto we Sizwe members of possible targets. As described above he appeared in the Rivonia Trial despite a clear conflict of interest, a conflict he never revealed to his fellow advocates. But Bram Fischer's most flagrant breach of the law came at his own trial when he jumped bail and went underground to continue aiding in the struggle. In a letter explaining his decision to the Court, he wrote:

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 out of a desire to be immoral, but because to act otherwise would, for him, be immoral.

History boasts many famous dissenters. Many of them made their name by rejecting the norms of their time. Many moved mountains through simple disagreement, and suffered greatly for their cause. In just the last century Mahatma Gandhi, Nelson Mandela Oliver Tambo, Steve Biko, Robert Mangaliso Sobukwe, Martin Luther King and many others chose the lonely road of dissent and were punished for it. Gandhi, Mandela and Sobukwe were jailed for long periods, Tambo spent years in exile, Biko and King were killed. It is not easy to tell the Emperor that he is in his birthday suit. But through the power of their



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ideas and their refusal to be cowed or intimidated, all these heroes won the admiration of many and changed the face of the world we live in.

One man, from a much earlier time, quite literally moved our world. Galileo built on Copernicus' theory that the Earth revolved around the Sun, rather than the Sun circling the Earth. Unlike Copernicus, Galileo insisted not only that his theory was a possible method to understand the workings of the heavens, but that it was in fact true. This, coupled with his caustic personality, got him into hot water with the Pope and he was eventually brought to stand trial before the Inquisition for heresy, for asserting what we today know to be true – the Earth revolves around the Sun. Galileo was allegedly forced, under threat of torture, to recant, but legend has it that after recanting, he was heard to mutter under his breath “And yet the earth does move.” Rebellious to the last, he spent his last years under house arrest. It took nearly 130 years for the Church to accept heliocentrism and over 300 years before the Church expressed its regret. While some question the accuracy of this version of Galileo's life, the myth remains a powerful reminder of the value and power of dissent.

In more recent times, and closer to home, there is the tragic story of Ken Saro-Wiwa who stood up for his people against the state. He wrote strongly against the exploitation of the Ogoni people by the Nigerian government and foreign oil companies. At his trial by a military tribunal Saro-Wiwa told his accusers and their judicial associates:

I have devoted my intellectual and material resources, my very life, to a cause in which I have total belief and from which I cannot be blackmailed or intimidated. I have no doubt at all about the ultimate success of my cause, no matter the trials and tribulations which I and those who believe with me may encounter on our journey. Nor imprisonment nor death can stop our ultimate victory.

He was of course convicted and hanged. But, as so often happens with martyrs, his death drew international condemnation of the Nigerian government and it was temporarily suspended from the Commonwealth. The widespread condemnation was partly responsible for the overthrow of that country's military dictatorship.

Not all dissents, however, involve massive projects. Sometimes the simplest Act can change the course of history. On December 1 1955 Rosa Parks, refused to move from her seat on the bus so that a white man could sit. In so doing, she defied an order by the conductor of the bus. That relatively small act of rebellion set off a chain reaction that inspired thousands to boycott buses and played a pivotal role in the American civil rights movement.



Not all dissenters have followers and not all their ideas change society. Sir Thomas More, for example, was famously executed in 1535 for refusing to recognise Henry VIII as the head of the Church in England. More was Chancellor of England and a highly respected lawyer and politician, but that did not prevent his beheading. His ideas largely died with him – nobody stood up to continue the fight against King Henry VIII. Today, More is recognised as the patron saint of lawyers and politicians. Some would see that as a dubious honour, but it is recognition of More's courage to face his accusers. In a sense, More's dissent did not change his society. The English Monarch remains the head of the Church of England.

What I hope these stories show is both the power of dissent and its cost. Sometimes the dissenter is the lone voice of reason in the dark. There will be some who privately agree with a dissenter, be it Galileo, Saro-Wiwa, Rosa Parks or More. The value and courage of dissent comes in standing up and pronouncing the difficult view in public and taking the consequences. It is easy to believe in something, it is much more difficult to speak out.

There are studies in modern psychology that demonstrate that people tend to follow and be influenced by the general beliefs of a group. What those experiments underscore is a need for independence of thought and action – a need to make space for people who refuse to accept the norm, despite overwhelming opposition to their opinions. Without expressions of disagreement, the group is the poorer, because it acts without all the knowledge that could be at its disposal and therefore often comes to the wrong decision. There is no doubt that dissenting views are important in all spheres of life, not least of all in the practice of law. They lead to healthy debate and a testing of generally accepted views, thus enriching the quality of the decisions taken.

Professor Cass Sunstein in his book *Why Societies Need Dissent* argues, through an evaluation of human behavioural patterns that people sometimes contradict their own opinions and ignore the evidence of their own eyes, in order to conform to a group.

He refers to an important experiment conducted by Solomon Asch, a social psychologist to determine the extent to which people conform to social pressures. The experiment was performed in the wake of World War II in part to try and understand how so many of the German people, presumably no different to other people in all nations in terms of being rational caring individuals, could have accepted the Nazi regime so easily. The subjects were shown two lines obviously of different lengths and in the face of group pressure, majority of subjects were willing to conclude that the lines were in fact identical. The experiments led Asch to come to the disturbing conclusion that many people are unwilling to trust their own beliefs or ideas on even the simplest of questions, in the face of group



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pressures. He concludes that: “The tendency to conformity in our society is so strong that reasonably intelligent and well-meaning young people are willing to call white black.”

In fact, the reality is even more disturbing. Asch was never entirely sure ‘whether people capitulate to the group despite knowing that the group is wrong or whether they conform because the group has altered their perception.’ Could it be true, as the Asch experiment shows, that some people actually believe that white is black? That is a scary thought. And if it affects us when we answer the simplest questions, how will it affect us when answering difficult questions of law, politics or morality?

We do know though that many people do express their opinions in public regardless of group pressures. Firstly, there is some reason to question the conclusions Asch drew from his experiments. While people might be willing to give in to the group when nothing is on the line, no matter how simple the question, studies show that they are much less likely to conform if something of value, money, their career, their reputation, is at stake. Indeed, Asch’s American survey on decision-making by judges indicated that while they were flexible on some issues, the opinions of other judges seldom swayed them on questions of abortion or capital punishment when life was on the line. In addition, Asch showed that if there was at least one other ‘voice of reason’, one confederate who gave the correct answer, the percentage of volunteers who gave the incorrect answer dropped dramatically. In fact, only one quarter of the people who originally agreed with the group continued to agree if there was at least one other person who dissented from the majority view. The point of this discussion is that if people speak up, the group as a whole is more likely to reach the correct outcome.

There is unquestionably a problem when people do not disclose their own contrary opinion or release information they have that contradicts the group view. Dissent has the advantage of enabling others to speak their minds and gives them the opportunity to think for themselves. Society needs people who will act against their own interest, if need be for the greater good. The need for dissent applies not only to everyday questions of practicality, fashion or law, but also, and perhaps most importantly to the deepest convictions of a society. In delivering the second Bram Fischer lecture the late Chief Justice Ismail Mahomed described, better than I can, the importance of dissent for any society to have legitimacy:

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.



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The importance of dissent can be seen in many areas of society. In government it is vital that there should be people who are willing to speak their mind against what appears to be public opinion and sometimes against the party line. In the business world, it is important for both the corporation and society at large that people blow the whistle on corrupt or unjust corporate practices. In civil society it is vital that no voice is silenced because it appears politically incorrect. Sometimes a particular view seems inappropriate because we ourselves have been influenced by group pressures or are we do not have all the relevant information. This again highlights the immense importance of freedom of speech. People must not only be technically free to speak their mind, but they must be made to feel free to express themselves. It is also important that all speech that is not directly harmful to others, no matter how unpopular or distasteful is protected. It has been said that: 'It is easy to guarantee freedom of speech when it is relatively innocuous. The time when it requires constitutional protection is precisely when it hurts.' We need to not only sit back and allow speech, but take positive measures to make it easier for others to speak out.

Dissenters are not always right. Often they will be wrong, and sometimes even cause harm. When dissent is based on a mass of emotions and not on reason it can easily become a tool of violence, disruption and scorn rather than a means to promote and encourage deliberation and understanding. My concern is not the content of dissent, the whole point of my address is that all views must be heard, it is the form that disagreement or rebellion can take.

But despite any dangers associated with dissent, what both experience and behavioural studies show us is that a group is much more likely to reach the correct decision if all people speak their mind. What I am saying is that we must nurture and protect dissent. If people feel threatened, if there are serious consequences to dissent, only the strongest amongst us, the Ghandis, the Rosa Parks and the Bram Fischers will stand up. Those people do not come along too often and the more comfortable ordinary people feel to express their disagreement, the better for all of us.

I have discussed the value of dissent generally and why the nature of human interaction requires that dissent be fostered. Much of what I have said is applicable to judicial dissent. Firstly, dissents directly or indirectly affect the course of the law. Although they may not be law, they plant the seed for future courts to re-evaluate the law in the future. There are examples of famous dissents which later became law. I have chosen predominantly from the American tradition, because they have one of the longer histories of dissent and some of the most vocal dissenters. In *Plessy v Ferguson* the majority of



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the Supreme Court held that separate but equal status for different races was constitutional. Justice Harlan wrote a strongly worded dissent. He asked:

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactment that in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?

The wisdom of Justice Harlan's question was later realised by the Supreme Court when in *Brown v Board of Education* they rejected segregation in favour of integration. Another famous dissent from the American tradition comes from *Bowers v Hardwick*. The majority of the Court upheld a state's ban on consensual sex between two males partly on the grounds that it was largely banned at the time the Constitution was adopted. Justice Blackmun wrote the following in dissent: 'I believe it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.' *Bowers* was famously overturned, and the truth of Blackmun J's judgment accepted, in *Lawrence v Texas*, only a few years ago.

There is one recent dissent that was so compelling that despite it being at variance with the majority vote.! The case concerned one Ramirez-Lopez who was arrested for illegally crossing the Mexican border of the United States of America together with 14 others. Two of those 14 told the police that Lopez was a smuggler while the remaining 12 stated that he was not. Lopez was not arraigned for two days while the police questioned the other witnesses. After two days, nine of Lopez's defenders were returned to Mexico and Lopez was unable to question them. At the trial Lopez argued that the delay in his arraignment was unreasonable. The Court disagreed considering the large number of witnesses that had to be interviewed. He also tried to rely on the statements the others had made to the police before being deported to Mexico, but they were declared hearsay. He was accordingly convicted and the conviction was upheld on appeal.

Judge Kozinski dissented. He framed his dissent as a conversation between Lopez and his lawyer. The lawyer was explaining to Lopez that despite being convicted, Lopez should be happy as he had received a fair trial. The judgment exposed how the adherence to the formal rules of evidence designed to protect accused and ensure fair trials, in the peculiar circumstances of the case produced a manifestly unjust result. The prosecuting authorities were so moved by the dissent that they dropped the charges against Lopez, released him from prison and returned him to Mexico.



Not all dissents become law. But many stimulate public and judicial debate about difficult legal, social and moral issues. As Henk Botha notes, by encouraging debate dissents promote the idea of a culture of justification that is a centrepiece of our new constitutional dispensation. According to Botha dissents help to expose both the individuality of judges and the deliberative nature of their decision-making process. A culture of justification means that power comes from ideas, not from authority, that the law is binding because it is good and rational, not solely because it is the law. People, especially lawyers, will not always agree about what the law should be and dissents encourage all of us to re-examine and question the validity of majority opinions.

Dissent explodes the myth that there is only one correct answer to legal questions. It illuminates in the starkest possible way that the law is uncertain and that judges are imperfect. As lawyers we all enjoy the idea that the law can be found in precedent, in books or in legislation. While sometimes that is true, often it is not. Dissents encourage debate about the true meaning of a law.

Linked to all that is the problem of the finality of the law. A judgment of court sets the law in stone and in the process silences other voices as wrong. A dissent keeps those voices alive. The voice may be faint, but it is there for future generations to hear. Not even the power of dissent can preserve all societies' voices, but it can save a few.

Despite all that I have said about the value of judicial dissent, there is also value in finding common ground. Finding common ground calls for deliberation, collective reflection and an open space for discussion; it does not mean silencing difference. As long as all the information is available and all feel free to express their opinions, dissenting or otherwise, we should be ecstatic if a group is still able to find an outcome with which everyone can agree. Not only does it promote collegiality and good relationships within the group, it is also most likely to be the best answer. This applies not only to the judiciary but to all groups that make decisions for diverse communities. Negotiation and accommodation if they take place with all the information at hand and in an open atmosphere, are often more valuable than disagreement and uncertainty.

Of importance in this respect is the need for judicial diversity. I am not talking here about transformation of the bench, which is important in South Africa for the simple reason that the bench should be representative of the population. Today I am talking to judicial diversity which implies not that there is an appropriate racial or gender mix, but that a wide range of views and life experiences are represented. Obviously diversity will often coincide with transformation, but they remain separate projects with separate purposes.



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Anyone who has been a judge will know that inter-action with other judges, particularly those with different backgrounds and different views on the law shape and enhance one's own opinions. Justice Kirby of the Australian High Court recently said:

Contrary to received wisdom, the capacity of politicians, elected by the people, to influence over time the composition of important courts ... is not a weakness of our constitutional and judicial system. It is a strength. It is precisely how the Constitution is expected to work. I do not agree with the idea of judicial appointment commissions made up mainly of judges, lawyers and other worthies from the elite. Such bodies, almost certainly would, clone-like, reproduce judges just like themselves. We do not need this. ... I discovered, truly, that diversity of judicial outlook was a most precious intellectual commodity. The conception of invariable certainty about the law, or incontestable judicial outcomes, is an infantile belief. Contemporary judges owe it to the people whom they serve to explain why this is so.

Judicial diversity is likely to increase judicial dissent and hence, as we have seen, improve the quality of decisions. Against the backdrop of the American legal system, Sunstein suggests that the Chief Judges who appoint three-judge panels should appoint panels in American courts with a mix of Republicans and Democrats. While South Africa does not share the stark political divide that America enjoys, there is certainly value in ensuring that panels of judges do not all share a common background.

I have spoken at length about the dangers of group conformity and the need to give space to dissent both in society at large and in the judiciary. I have emphasised that stifling dissent is bad for us all; it deprives us of not only the benefit of the dissenter's view but also views of the many others who would never speak up until one person dares to be different.

But let me, in conclusion, return to Bram Fischer. Stephen Ellmann has written an insightful article in which he questions the effect of Bram Fischer's violation of the law. Is it not possible, Ellmann asks, that Bram's violation of the rule of law could undermine the revolution for which he fought – a revolution that would be based on the rule of law? Ellmann reaches his own insightful conclusion. My own is much more simple. Although he believed in law, Bram Fischer saw his fight as being one for justice. It was a fight for everybody to be treated with equality and dignity and respect. In the words of the Chief Justice Ismail Mohamed, Bram Fischer taught us that lawyers must always remember '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; [and] that the ethical objectives of the law contain the life blood of a nation'. That is the legacy he left for us: it urges us to stand up against ignorance, oppression and conformity; to always strive



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to make the law just; and to tell the truth about the Emperor's robes, no matter the consequences.

Thank you.