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BRAM FISCHER MEMORIAL LECTURE



Third Bram Fischer Lecture - Justice Arthur Chaskalson (2000)

It is a privilege to deliver the Third Bram Fischer Lecture. Like so many who had the good fortune to know Bram, I was drawn to his warmth, humanity and dignity and admired and respected him. In his biography of Bram, Stephen Clingman says of him: He came out of Afrikaner nationalism; he died belonging to the whole of South Africa. He never saw this as a betrayal of Afrikaner identity, but rather as its fulfilment, its extension towards the true meaning of the name 'African'. He was a white man able to undertake, in the course of his own life, the personal transformation that must accompany, if not herald, the political. At a time when it would have been almost unimaginable to say so, instinctively and by conviction he understood that if whites were to have a meaning and a future in South Africa, this was the kind of change they would have to undergo. And so he took it on - a story of identity, its retention and extension, into the marrow of his own life. In the First Bram Fischer lecture President Mandela spoke about Bram's role in the freedom struggle, of his decision to absent himself from his first trial and to go underground to continue his struggle against apartheid, of his courage and commitment; and of his willingness to sacrifice all for what he believed in. The Second Bram Fischer Lecture was given by Chief Justice Mahomed. 3 He talked about a different aspect of Bram's life - Bram the lawyer. He spoke about law and justice and what happens within a society when its laws cease to be legitimate because they lack any semblance of justice and morality. Bram addressed both these issues at his trials: the illegitimacy of apartheid law and his commitment to the freedom struggle. In a letter to the court, after he had absented himself from the first trial, he explained his decision to continue his political work underground. The decision had not been taken lightly. My decision [he said] was made only because I believe that it is the duty of every true opponent of this government to oppose its monstrous policy of apartheid with every means in his power. That is what I shall do for as long as I can. . . . Cruel, discriminatory laws multiply each year, bitterness and hatred of the government and its laws are growing daily. No outlet for this hatred is permitted because political rights have been removed. National organisations have been outlawed and leaders, not in gaol, have been banned from speaking and meeting.

People are hounded by the Pass Laws and by Group Area controls. Torture by solitary confinement, and worse, has been legalised by an elected Parliament - surely an event unique in history. . . . 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. . . . [T]hese are my reasons for absenting myself from Court.

He knew that in time it was inevitable that he would again be arrested and put on trial. He acknowledged this in his letter to the court, saying: I realise fully that my eventual punishment may be increased by my present conduct. . . . If by my fight I can encourage



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even some people to think about, to understand and to abandon the policies they now so blindly follow, I shall not regret any punishment I may incur. I can no longer serve justice in the way I have attempted to do during the past thirty years. I can only do so in the way I have now chosen. He was underground for almost ten months, then captured and put on trial again. The second trial was in the Supreme Court not the Magistrate's Court, and this time he faced a charge that carried the death sentence. At his trial he referred again to his reasons for seeing apartheid as an evil that had to be opposed and to his decision to go underground to continue his opposition to it. He referred to his own background, he talked about events that shaped his political beliefs, of the reasons why he had joined the Communist Party and had continued to remain a member after it had been declared illegal, of his abhorrence of apartheid and of his commitment to non-racism. He defined the chief objectives for which he had lived and worked as 'the elimination of discrimination and the granting of all normal human rights' to the people of South Africa. He went on to say: All the conduct . . . with which I have been charged, has been directed towards maintaining contact and understanding between the races of this country. If one day it may help to establish a bridge across which white leaders and the real leaders of the non-whites can meet to settle the destinies of all of us by negotiation, and not by force of arms, I will be able to bear with fortitude any sentence which this Court may impose on me. He concluded his speech by referring to the words of Paul Kruger, giving them a meaning different to that they had had when they were uttered in 1881, 'freedom shall rise in Africa like the sun from the morning clouds'. His sentence was life imprisonment. He died a prisoner before the rising of the sun.

Almost 19 years after Bram's death the negotiated settlement that he had envisaged was reached. The settlement is recorded as 'a solemn pact' in the interim Constitution, 8 which ushered in the freedom for which he and many others had struggled and for which they had risked their lives and liberty. Incorporated into that Constitution was a resolution on national unity and reconciliation. In words reminiscent of those spoken by Bram at his trial, it described the Constitution as an 'historic bridge' between the injustice and suffering of the past and [a] future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The interim Constitution put an end to institutional discrimination and contained far reaching guarantees of human rights. What Bram had described as a major objective of his life and work had been achieved. As President Mandela said in the first Bram Fischer lecture, had he been alive a year ago to celebrate with us the freedom we gained for all South Africans he would have been well pleased. Law and justice, democracy and human rights: issues central to Bram's life, are issues that I will address tonight. I do so, not in the context of the past but in that of the present and the future. I will focus on the foundational value of respect for human dignity, an attribute which Bram displayed in every aspect of his life.



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Freedom has come. It is enshrined in a Constitution adopted by an elected Constitutional Assembly to be the supreme law of the land. A Constitution that declares in express terms in its preamble that its purpose is to '[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'. A Constitution that declares explicitly that the founding values of the new society are: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. These are the values that must now inform all aspects of our legal order. The Constitutional Court has affirmed this, holding that our legal system is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. The founding values are articulated in the Bill of Rights, which is referred to in the Constitution as '[a] cornerstone of democracy in South Africa [which] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. The affirmation of human dignity as one of the founding values of the Constitution is significant. The interim Constitution emphasised the values of democracy, freedom and equality. Although dignity is immanent in these values and in the rights entrenched in the interim Constitution's Bill of Rights, its role as a foundational value of the constitutional order was not acknowledged in specific terms until the adoption of the 1996 Constitution. Consistently with this, the 1996 Constitution now refers to the 'inherent dignity' of all people, thus asserting that respect for human dignity, and all that flows from it, is an attribute of life itself, and not a privilege granted by the state. The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war. It also brings the language of the Constitution closer to the Charter of the Organisation of African Unity, and the African Charter on Human and Peoples Rights, which record that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.' The Charter of the United Nations - its constitutive document - calls upon member states 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. When the Charter was adopted the commitment demanded from member states was radical. Before the war, human rights had been protected by the domestic law of some countries but not by international law. And in many parts of the world, practices inconsistent with respect for fundamental rights and human dignity were sanctioned. Colonialism, discrimination and exploitation were widespread. This was so even in places where the legal order was rights-based. In the United States of America, for instance, fundamental rights had been entrenched in the constitution for more than 150 years, yet racial segregation was practised, particularly in the South, and racial and gender discrimination existed throughout the country.



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An even greater paradox is that for the first 90 years of the union slavery was permitted, and it was a crime to assist run-away slaves.

Reacting to the horrors of the recent war, the UN Charter articulates aspirations for a quite different legal order. It goes beyond affirming faith in human rights. It requires also from all member states, a pledge to promote 'respect for and universal observance of human rights and fundamental freedoms' and a commitment to take joint and separate action in cooperation with the United Nations for the achievement of this purpose. This pledge is often breached; nevertheless it is an essential basis for the efforts of the United Nations to promote world peace. The Universal Declaration of Human Rights was the first major step taken in pursuit of this goal. Article 1 of the Declaration says '[a]ll human beings are born free and equal in dignity and rights'. Building on this foundation, the second article makes clear that the rights to which everyone is entitled must be respected without distinction of any kind. The remaining articles enumerate the rights to which 'everyone' is entitled. The preamble to the International Covenant on Civil and Political Rights asserts that fundamental rights 'derive from the inherent dignity of the human person'. A foundational role is also attributed to the inherent dignity of all persons in the International Covenant on Economic, Social and Cultural Rights, and other international human rights instruments. Respect for human dignity is a value implicit in almost all the rights enumerated in the Universal Declaration as it must be in any order based on human rights. Thus, in Canada, where the Constitution contains no specific reference to dignity, the Canadian Supreme Court has said that the genesis of the rights and freedoms in the Canadian Charter includes 'respect for the inherent dignity of the human person', and that '[t]he idea of dignity finds expression in almost every right and freedom guaranteed by the [Canadian] Charter'. Nowhere is the connection between human rights and dignity clearer than in German law. The German Constitution, like ours, was adopted in the aftermath of a political order that showed no respect for the inherent dignity of human beings. The basic rights set out in the German constitution are preceded by a statement that 'the dignity of man shall be inviolable'. The enumerated rights that follow are interpreted and applied by the German Federal Constitutional Court in the context of the foundational value of dignity and the decisions of the German courts provide a prodigious jurisprudence of dignity. Over the past fifty years human rights jurisprudence has developed in many different parts of the world, and human dignity has come to be accepted as a core value of this area of jurisprudence. By 1983, Oscar Schachter could say: Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognised as to require no independent support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good. Dignity finds its place in the first section of our Constitution together with respect for democracy, freedom and equality in a legal order in which there is separation of powers, in which the Constitution is



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the supreme law and in which human rights and the rule of law are to be upheld. The Constitution also lays down in specific terms that 'law or conduct inconsistent with [its provisions] is invalid and obligations imposed by it must be fulfilled'. The legal order thus established lays the foundations for a new democratic order consistent with the provisions of the Constitution and the values that it espouses. The transformative goals of the Constitution have been affirmed by the Constitutional Court on more than one occasion. What is important is that the Constitution does not simply remove apartheid laws and sanitise the old legal order. It does much more than that. Justice Mahomed put it this way in his judgment in *S v Makwanyane*:

In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.

The Constitution demands, therefore, that our society be transformed from the closed, repressive, racial oligarchy of the past, to an open and democratic society based on human dignity, equality and freedom. In the light of our history the changes brought about initially by the interim Constitution and subsequently confirmed by the 1996 Constitution are revolutionary. It is a principle of democratic government that conflicts relating to the legality of the exercise of all power must be resolved institutionally and not through force. The institution that ordinarily has this responsibility is the judiciary. This is explicit in our Constitution, which vests judicial authority of the Republic in the courts, and declares them to be independent and obliged to apply the law 'impartially and without fear, favour or prejudice'. The Constitution also requires courts dealing with constitutional matters to 'declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. Decisions of the courts bind all persons and organs of state. All organs of state are required to assist the courts to ensure their effectiveness.

Constitutionalism, rooted in respect for human rights, has taken the place of apartheid and racial domination. We recognise from bitter experience that power can be abused. History is replete with examples of dictators and tyrants who have done this. But power can also be abused by elected governments. In South Africa that abuse was carried out by a government representative of a minority who held the levers of power, and used that power ruthlessly to advance their own interests and to impose their will on the majority. It is, however, not only



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dictators and minority governments that are capable of abusing power. An extreme example of the abuse of power is Nazi Germany. The Nazis came to power in Germany following a democratic election and, once in power, manipulated it to their advantage in order to perpetuate their hold on power. They wielded power with great cruelty and it was this more than anything else that led the United Nations to adopt the Universal Declaration of Human Rights. This is recorded in the preamble to the Declaration which says that a 'disregard and contempt for human rights . . . resulted in barbarous acts which have outraged the conscience of mankind', that the 'peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life'. It records, also, the pledge made in the Charter to promote 'universal respect for and observance of human rights and fundamental freedoms' and goes on to proclaim the Universal Declaration of Human Rights 'as a common standard for all peoples and all nations' for the attainment of this goal. In a constitutional democracy such as ours, this commitment is honoured by making the Constitution the supreme law and entrenching fundamental rights that bind all organs of state including parliament. There are institutional paradoxes inherent in constitutional democracy that have provoked debate and disagreement. These, however, lie beyond the scope of tonight's lecture. What is relevant is that this form of government has been adopted by our Constitution, and that public power has to be exercised within the framework set by the Constitution; a framework designed to protect democracy, constitutionalism, and respect for human dignity, equality and freedom.

A purpose of our Constitution is to establish an open and democratic society. An open and democratic society has to accommodate the different and conflicting interests of individuals and groups within that society. Under the separation of powers provided for by the Constitution, courts have an important role to play in this process. Respect for human dignity is crucial to accommodate conflicting interests; so too is respect for the other foundational values - democracy, equality and freedom. There are, however, potential tensions between these values which courts have to resolve. This is not a problem peculiar to South Africa. It is a problem of constitutionalism and is experienced wherever constitutional government is in force. Lord Steyn refers to this in a discussion of the constitutionalisation of public law. He illustrates the problem by quoting Isaiah Berlin, who says: Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted. . . . Equality may demand the restraint of the liberty of those who wish to dominate; liberty - without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word - may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised.



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The result, according to Lord Steyn, is that: Courts will sometimes have to balance the protection of the fundamental rights of individuals against the general interests of the community. Individualised justice and the stability needed in any democratic society may be in contention. . . . Often courts will have to choose between competing values and make sophisticated judgments as to their relative weights. This balancing may be required in the application of the provisions of the Constitution to concrete cases. An example is a case where a statute limits a constitutional right and the government seeks to justify the limitation as being reasonable and justifiable in an open and democratic society. To decide the case the court has to undertake a proportionality analysis calling for a balancing of the conflicting rights and interests involved. But balancing can also take place at an anterior level by interpreting rights and values in ways that avoid conflicts. Freedom does not mean total freedom. In a democratic society freedom can never be absolute. It must be exercised with due regard to the legitimate interests of other members of the society, and the countervailing claims of other constitutional values. Countervailing claims of equality necessary to give effect to the transformative purpose of the Constitution are specifically acknowledged in our Constitution which makes provision for socio-economic rights and provides that equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Countervailing claims of democracy demand that the regulatory role of government in a democratic society be recognised, and this has been held by the Constitutional Court to be relevant to the interpretation of freedom rights in the Constitution. All organs of state have an obligation to dismantle patterns of past discrimination. The freedom recognised by our Constitution is therefore a freedom that has regard to the dignity and equality of others and the day to day imperatives of government in post apartheid South Africa. There is also a close link between dignity and equality. No society can promise equality of goods or wealth.

Nor could it reasonably be thought that this is what our Constitution contemplates. It recognises that at the level of basic needs, such as housing, health care, food, water and social security, profound inadequacies require state intervention and that the state is obliged to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of access to such goods. What then does equality mean? It must at least mean that there be equality of rights.

Our Constitution recognises this providing that everyone is 'equal before the law', and that everyone is entitled to 'equal protection and benefit of the law'. It also prohibits unfair discrimination. To give these rights a purely formal meaning would serve to entrench rather than dismantle patterns of past discrimination and that would be inconsistent with the



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transformative purpose of the Constitution. Something more is called for. To be consistent with the underlying values of the Constitution, equality must also include equality of worth, requiring everyone be treated with equal respect and with equal concern, a principle which Ronald Dworkin describes as being 'of quite breathtaking scope and power'.⁴³ On this construction of the equality clause the relationship between equality and dignity is clear. It recognises a substantive content in equality and this is the approach that the Constitutional Court has taken to the interpretation and application of the equality clause of our Constitution.

The Constitution refers to 'the achievement of equality' as a founding value. Ours is an unequal society and the Constitution recognises that positive action is necessary to establish conditions in which there is not only equality of rights but also equality of dignity. To this end the Constitution provides that the state must take action to achieve the progressive realisation of socio-economic rights to housing, health care, food, water and social security. It recognises 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources' and requires the state to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'. Under the Constitution, the Human Rights Commission and the Commission for Gender Equality have a special responsibility to promote respect for human rights including the realisation of socio-economic rights and the attainment of gender equality. The commitment to substantive equality is clear.

As the Constitutional Court has said, the equality provisions of the Constitution are premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with. As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance? But social and economic policies are pre-eminently policy matters that are the concern of government. In formulating such policies the government has to consider not only the rights of individuals to live with dignity, but also the general interests of the community concerning the application of resources.

Individualised justice may have to give way here to the general interests of the community. And so, as the Constitutional Court has said: There will be times when this requires [the state] to adopt an holistic approach to the larger needs of society rather than to focus on the



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specific needs of particular individuals within society. If different and conflicting interests of individuals and groups within our society are to be accommodated, and if full weight is to be given to the transformative purpose of the Constitution, the foundational values of democracy, dignity, equality and freedom must be interpreted consistently with these ends, and if possible, in ways that bring them into harmony with one another. As a consequence of our history, structural impediments remain to the achievement of 'dignity, equality and freedom'. Millions of people are still without houses, education and jobs, and there can be little dignity in living under such conditions. Dignity, equality and freedom will only be achieved when the socio-economic conditions are transformed to make this possible. This will take time. In the meantime government must give effect to its obligations under the Constitution to show respect and concern for those whose basic needs have to be met. The courts must give meaning to and apply the Bill of Rights and other provisions of the Constitution in the context of our history, the conditions prevailing in our society, and the transformative goals of the Constitution. The manner in which the government and the courts give effect to their constitutional obligations, and in particular the way in which government action is taken and the law developed to promote the values of the Constitution have important implications for the process of transformation.

Speaking after almost thirty years of service on the US Supreme Court, Justice Brennan said: I do not mean to suggest that we have in the last quarter-century achieved a comprehensive definition of the constitutional ideal of human dignity. . . . For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve. In the light of our history the recognition and realisation of the evolving demands of human dignity in our society - a society under transformation - is of particular importance for the type of society we have in the future.

The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so. We seem temporarily to have lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom. The Legal Resources Centre has not lost that energy, commitment and sense of community; nor have other important organs of civil society. They deserve our support and encouragement. But more is needed than that. All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done. It is important that we regain the energy, the commitment and the sense of community we once had, and use it to give effect to the values and aspirations of the Constitution. At a gathering such as



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this, when we reflect on the life choices made by Bram Fischer and others like him who dedicated themselves to the achievement of a just society in South Africa, and when we reflect on our Constitution and its aspirations, it is appropriate that we remind ourselves of what still remains to be done and of the commitment that it demands from us all.

President of the Constitutional Court of South Africa. The assistance of Susie Cowen, Sean Flynn and Linda Naidoo in the preparation of this address is gratefully acknowledged.