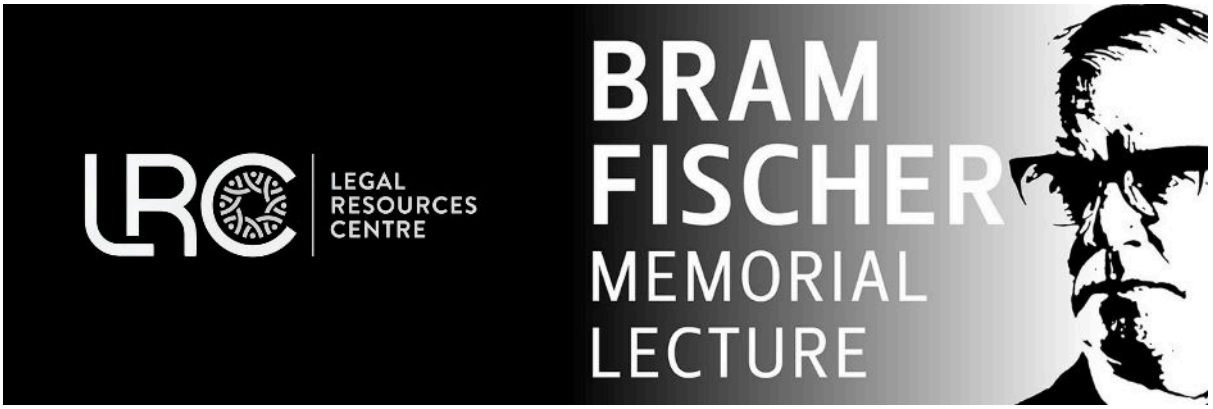


Fourth Bram Fischer Lecture - Justice Dikgang Moseneke (2002)

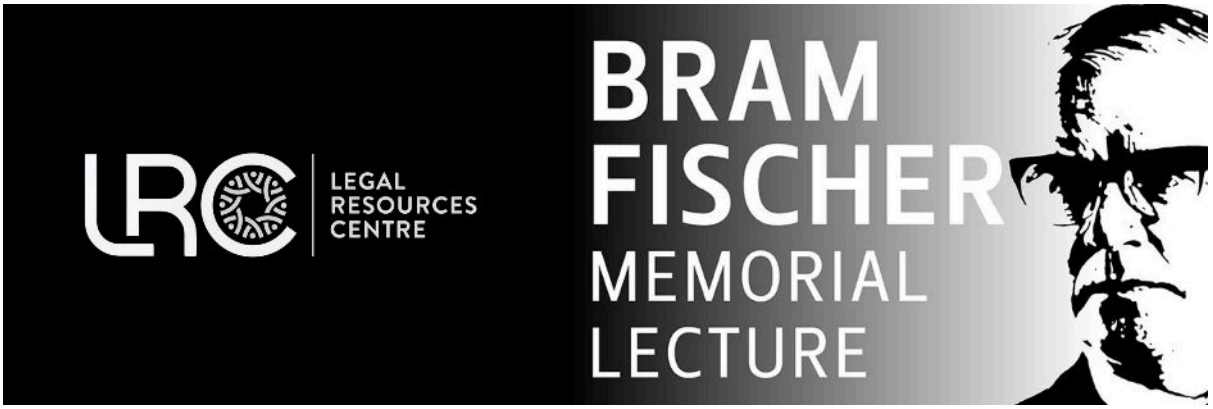
It falls on me to deliver the fourth Bram Fischer Memorial Lecture. At the outset, I wish to thank the Legal Resources Centre for keeping alive the memory of the treasured life of Bram Fischer. The invitation to deliver the Bram Fischer Memorial Lecture is a privilege. This invitation is as gracious as it is daunting. Unlike my illustrious and acclaimed predecessors, Mr Nelson Mandela, the first President of a democratic South Africa, the departed Chief Justice Ismail Mahomed and our present Chief Justice Arthur Chaskalson, I was not privileged to know personally the excellence of Bram Fischer's legal advocacy, the steadfastness of his socio-political convictions and the warmth of his personal interactions, the integrity of his character. I blame my misfortune on my premature departure for Robben Island prison in 1963. A good three years before Bram Fischer was condemned to life imprisonment in March 1966.

Mr Mandela delivered the first lecture in memory and honour of Bram Fischer a little beyond a year after the advent of freedom and non-racial democracy in South Africa. Mr Mandela paid, if not reverent triumphant homage to a great advocate and a great patriot. Whilst Mr Mandela had unending admiration and respect for his legal advocacy, it was Bram Fischer the great patriot and comrade in the road to freedom Mr Mandela chose to eulogise. In the concluding remarks of the memorial lecture, he observed that:

In any history written of our country two Afrikaner names will always be remembered. Happily, one is still with us, dear comrade Beyers Naude. The other is Bram Fischer. The people of South Africa will never forget him. He was among the first bright beacons that attracted millions of our young people to fervently believe in a non-racial democracy in our country.

Bram Fischer was a remarkable person. His life was as accomplished, as it was complex. His intellectual skills are said to have been towering. He was endowed with disarming courtesy. Bram Fischer was known to be a stoic about his own circumstances or personal needs yet sensitive to and compassionate about the needs of others. He exhibited selflessness, which might have bordered on heroism if not naivety. His integrity was beyond reproach. He had enormous courage to confront difficult moral choices. Once a moral choice had crystallised to a conviction it was worthy of unwavering fidelity.

The story of the life of Bram Fischer is by now not unknown. It has been recounted by many awe-struck writers. Bram Fischer was born in 1908 into a highly placed Afrikaner family. During the Anglo-Boer War, his grandfather served as a close confidante of President Steyn of the Orange Free State. The Boers were defeated in the war. It fell on his grandfather to lead as Prime Minister of the Orange River Colony, then wrecked by the savagery of war.



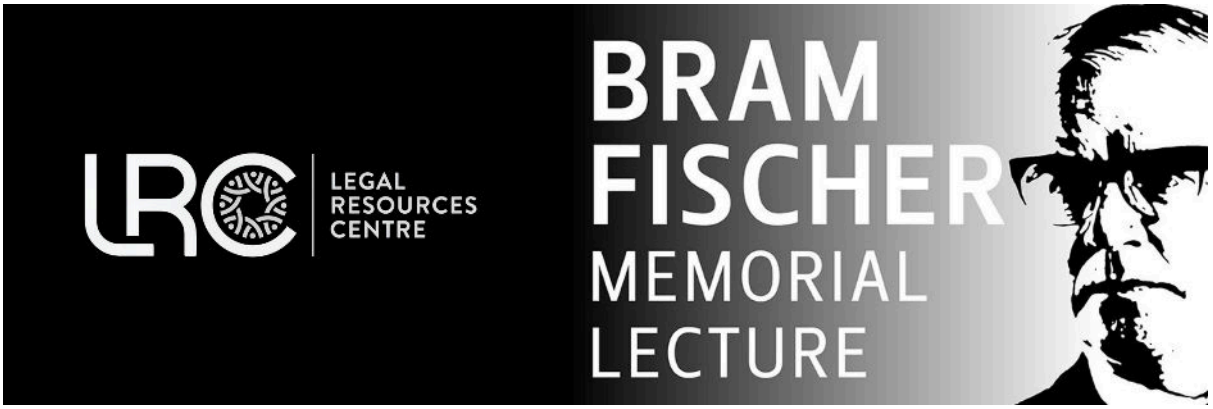
Bram's father, Percy Ulrich Fischer espoused a fervent Afrikaner nationalism. He was a member of the Free State Bar. With the outbreak of the First World War, several Free State burgers would not answer to the call to war of the British Empire. Many rather chose to fight on the side of Germany. They rose against the Union government of General Louis Botha, who supported the war effort. Treason and mutiny trials against the rebels ensued. Several Boer rebels were sentenced to prison for refusing to join the British Imperial forces. Bram's father appeared as counsel for the rebels. His support for the cause of the rebels was a matter of public knowledge. In time, his close association with the cause of the rebels affected his practice at the bar negatively and led to near financial ruin.

Ulrich often took Bram along when his family made prison visits to General de Wet and other rebels in prison. In 1929, Percy Ulrich Fischer was raised to the bench of the Supreme Court and later became Judge President of the Free State. In March 1948, just before the Nationalist came into power, Judge President Fischer retired and on 10 June 1957 died.

Bram's own youth was not uneventful. He grew up within the Bloemfontein elite. He went to Grey College. At 18, he was admitted to the University of Cape Town and later to Grey University College. He had little difficulty in winning a Rhodes scholarship to New College Oxford. His scholastic prowess was matched only by his sporting ability. He made the Free State provincial colours as a scrum half against the New Zealand team then touring South Africa in the winter of 1928. Bram left for Oxford. In 1932 and 1933, whilst studying in Oxford, Bram travelled to Russia and to several other European capitals. His visit of the Soviet Union did not leave Bram's view of the world untainted.

On 16 December 1933 whilst in London and at a dinner of South Africans gathered to observe Dingaan's Day, Bram Fischer called to question the efficacy of nationalism. Of it he said:

No one but an out and out national-socialist would regard nationalism as an end in itself. Nationalism is if anything, a means to an end and before we seek to further it, we must have some idea of the end for which we are striving. As for the Great Trek, one stands amazed at the courage of men and women prepared to sacrifice, to start life again in the wholly unknown against overwhelming odds and untold dangers. Today we stand again before a parting of the ways. Time out of number we have heard of Blood River referred to as bringing the boon of European civilisation to Southern Africa. But one point of view I have never heard Dingaan's Day considered from is the point of view of Dingaan. In everyday life, we drug our consciences and critical faculties to his successors. The time has come, if it is not already growing late, for an acute examination of this attitude. Many ideas as to race and nationality have to be destroyed or modified. This will require a new attitude of mind of all human qualities, perhaps the most difficult.



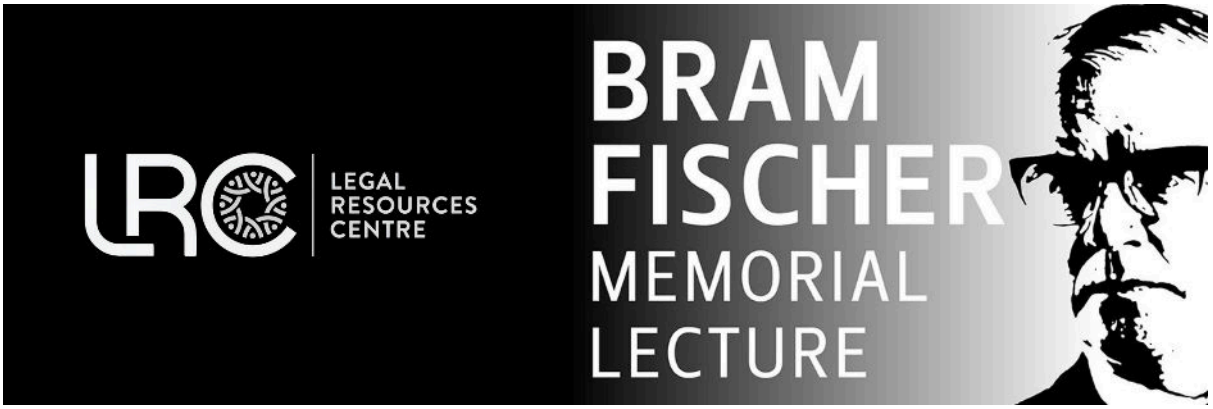
Bram Fischer's worldview had changed. He had no illusions about the centrality of the Great Trek in Afrikaner history. The Great Trek, he knew, was the high watermark of the Afrikaner nationalism. Bram knew that the mythicised past of his forebearers was the antecedent for the revival of Afrikaner nationalism. Nevertheless, Bram made the intellectual and emotional migration from a past of racial bigotry and parochial nationalism to the large untested quest for substantive social justice both at home and abroad.

In 1935, Bram Fischer was called to the Bar. Shortly thereafter, he married Molly. However, some believed that Bram had espoused communism at Oxford already. Bram joined the Communist Party of South Africa (CPSA), in 1938, recruited by Yusuf Dadoo. His talents and dedication to the objectives of the CPSA assured Bram a position in the central committee of the CPSA in a relatively short time. Bram's political consorts included Brian Bunting, Yusuf Dadoo, Moses Kotane, Sam Kahn, JB Marks, Jack Simons and Edwin Mofutsanyana, Dannie du Plessis, Joe Slovo and Harold Wolpe - the full kaleidoscope of South African ethnic diversity. In 1951 the CPSA was banned and as expected Bram made the statutory list of communists. The Communist Party was reconstituted as the SACP and Bram and his colleagues continued to pursue its broader objectives in a different guise.

Bram had a brilliant career at the Bar. Of this, Ismail Mohamed says his intellectual endowment was towering, enabling him to sparkle among the very top of the largest Bar in the country with his intimidating skills as a civil jurist of distinction and a trial lawyer of great competence. Geoff Budlender observed that he earned both endearment and respect of his bar colleagues, who knew his political affiliations. Bram was voted to the Bar Council for nearly 18 years. He was appointment chairman of the Bar in 1961.

The role and contribution of Bram Fischer QC, (led by Maisels QC,) as counsel for the accused in the treason trial of 1956 to 1961 is legendary. The treason trialists were acquitted. Within 2 years of the treason trial acquittals, the Rivonia trial commenced. After much persuasion, Bram alive to the possibility of his own complicity to the charges faced by the Rivonia trialists, agreed to lead the defence team.

It was only a matter of time before Bram Fischer was himself in the dock for his role in the underground activities of Umkhonto we Sizwe and the SACP. He was condemned to life imprisonment. The conditions of his imprisonment were harsh and intended to demean his dignity and break his defiant spirit. At the age of 67, in 1975, Bram Fischer succumbed. His ashes were claimed by the State. Ismail Mohamed observed that then he was neither the Prime Minister or the Chief Justice of his country but a convicted prisoner serving life imprisonment, his emaciated body riddled with incurable cancer, his professional claims publicly repudiated by his removal from the roll of advocates on the initiative of his own colleagues at the Bar.



Bram Fischer was disbarred for dishonest conduct. Bram Fischer dismissed the accusation of dishonesty out of hand. Bram Fischer raised fundamental issues of law, morality and justice. Bram pointed out that when laws become immoral then a higher duty arises. This compels one to refuse to recognise such law. Bram by his word and conduct demonstrated that law must be moral; law must be just, only then is it worthy of the fidelity of its citizens.

Honourable people have to make honorable choices. Bram was confronted by an excruciating moral choice. Bram Fischer made the choice. He did not seem to believe that expediency was an option:

When an advocate does what I have done...it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that, whatever the consequences to himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to act otherwise would, for him, be immoral.

With the benefit of the passage of time, abatement of political obsession of yesteryear and in recognition of his moral fortitude, it would not be untoward to move for the re-admission of Bram Fischer to the Bar posthumously. A special statutory provision should readily overcome the technical or jurisdictional impediments, which may be posed by the Admission of Advocates Act [20].

The story of Bram Fischer's life holds poignant lessons. President Nelson Mandela referred to Bram's relentless commitment to the freedom struggle. Chief Justice Ismail Mohamed was cognisant of Bram Fischer's profound fidelity to the trite proposition that law must be just; law must be morally defensible as tested against the common conviction of the community at large. Chief Justice Chaskalson reminds us that affirmation of inherent human dignity is one of the founding values of the Constitution just as much as human dignity was an attribute Bram displayed in every aspect of his life. In this memorial lecture, I seek to pay tribute to Bram Fischer's lifetime preoccupation with social justice; with the pursuit of a substantively egalitarian society. I shall, albeit briefly, debate whether there is room for transformative judicial adjudication in pursuit of social justice.

Our Constitution holds great promise for our new society. Its Preamble records that the Constitution, as the supreme law of the land, was adopted to heal the division of the past, to establish a society premised on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizen and free the potential of each person.

The fundamental values of the new democratic state include human dignity and the achievement of equality. The promise of social justice does not resurface eo nomine in the Founding Provisions (Chap. 1) or in the Bill of Rights (Chap. 2). It is at the very least

arguable that the constitutional goal of social justice is not explicitly coterminous with the expanded statement of the right to equality in Sec. 9 of the Bill of Rights. Even so, it is argued here below that a creative jurisprudence of equality coupled with substantive interpretation of the content of socio-economic rights should restore social justice as a premier foundational value of our constitutional democracy side by side, if not interactively with human dignity, equality, freedom, accountability responsiveness and openness.

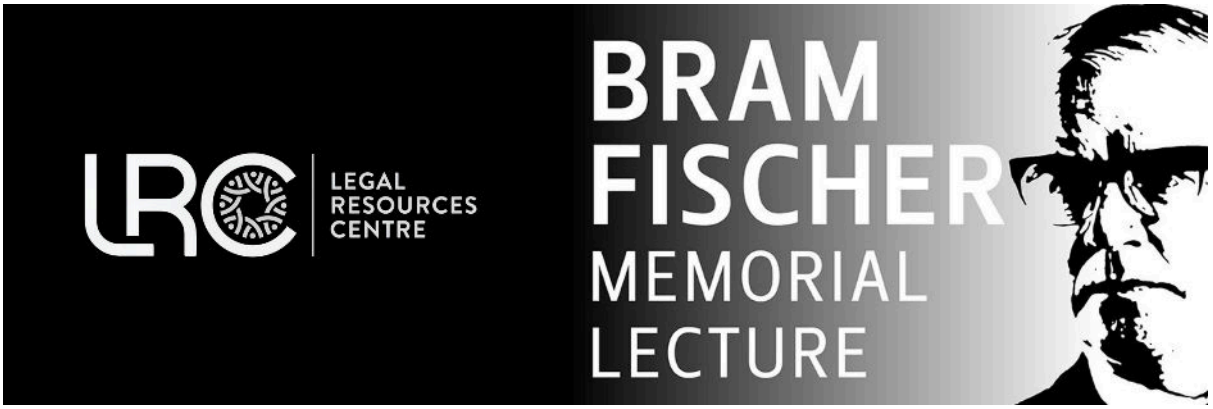
Implicit is this proposition is that the Constitution enjoins the judiciary to uphold and advance the transformative design of the Constitution. This momentous constitutional imperative binds not only the judiciary but also all organs of the state. Moreover, the Constitution as supreme law applies to all law and binds all organs of state and the judiciary alike. Law or conduct inconsistent with it is invalid. The all-pervasive supremacy of the Constitution is articulated by Chaskalson P (as he was then) in the Pharmaceutical Manufactures-case in the following terms:

I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It 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 common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfill the purposes of the Constitution and the legal order that it proclaims thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport and objects of the Bill of Rights'. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.

What is the transformation envisioned by the Constitution and the Bill of Rights in particular? Albertyn and Goldblatt's answer to this vexed question is instructive:

We understand transformation to require a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.



Few would contest that the imperative of the new legal order is the creation of a society different from our socially degrading and economically exploitative apartheid past. However, the meaning of transformation in juridicial terms is as highly contested, as it is difficult to formulate. The legal content of the constitutionally entrenched rights is derived from the foundational values of the Constitution. The symbiotic relationship between these values and the legal content of the respective rights defies easy definition. This is to be expected because values are normative. Their worth and hierarchy is variable and contingent upon a given or predetermined value system.

However, in the case of our Constitution a specified set of values informs what is permissible in an open and democratic society based on freedom and equality. Perforce our constitutional interpretation is set against the backdrop of the values of the South African society. Constitutional adjudication must occur within that holistic, value-based framework. The Constitution is a repository of the values which bind its people.

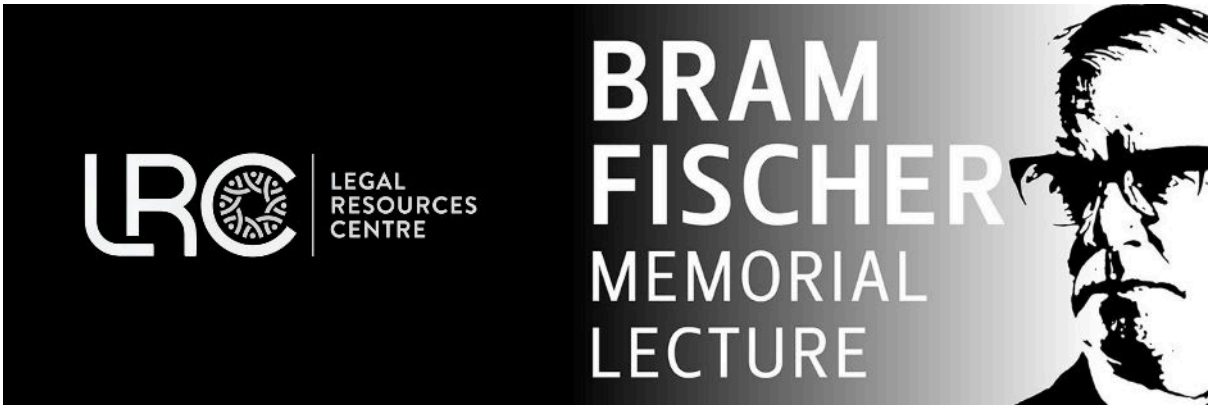
The jurisprudence resulting from this value-drenched notion of constitutional adjudication will not be easy to develop. Justice Sachs reminds us that:

Just as the transformation of our harsh reality is by its very nature difficult to accomplish, so it is hard to develop a corresponding and appropriate jurisprudence of transition.

Liberal legalism balks at the idea of transformative adjudication. The primary objection is that such jurisprudence invites judges to accomplish political objectives. The judicial mindset seeks a distinct differentiation between the legislative and the judicial function. On this approach, the judicial function primarily is directed at providing legal interpretation of texts of rules of law as distinct from imposing subjective intellectual, ethical or other preferred views. In liberal jurisprudence a value driven adjudicative style which permits extra legal considerations is to be avoided.

Until 1994, the South African legal culture has been homogenous, conservative and predictable. It was informed by inflexible legal positivism predicated upon parliamentary sovereignty. Adjudication was rule based. Law drew its legitimacy from the very fact that it was state sanctioned. The material context or the social aftermath of the application of the rule was deemed irrelevant. In that scenario, judges were deemed to have no duty to dispense justice in any sense other than permitted by the law. Judicial activism had little or no place. That notion of the rule of the law is constrained to exclude intrusion of all extraneous considerations in adjudication.

Judicial interpretation under the Constitution has placed different imperatives upon the adjudicator. Austere legalism suitable for interpretation of statutes is not suitable to constitutional interpretation. The intention of the drafter is of little avail in constitutional



interpretation As intimated earlier, the salutary approach to constitutional interpretation, is one which provides the most adequate response to the countermajoritarian dilemma by giving effect to the underlying values of the Constitution. It seems to me that our constitutional design of conferring vast powers of judicial review to the courts becomes optimal only if the courts are true to the constitutional mandate. It is argued that, in their work courts should search for substantive justice, which is to be inferred from the foundational values of the constitution. After all that is the injunction of the Constitution -- transformation.

Central to that transformation is the achievement of equality. An egalitarian society would not be possible unless there is a total reconstruction of the power relations in society with the consequence that human development is maximised and material imbalances redressed.

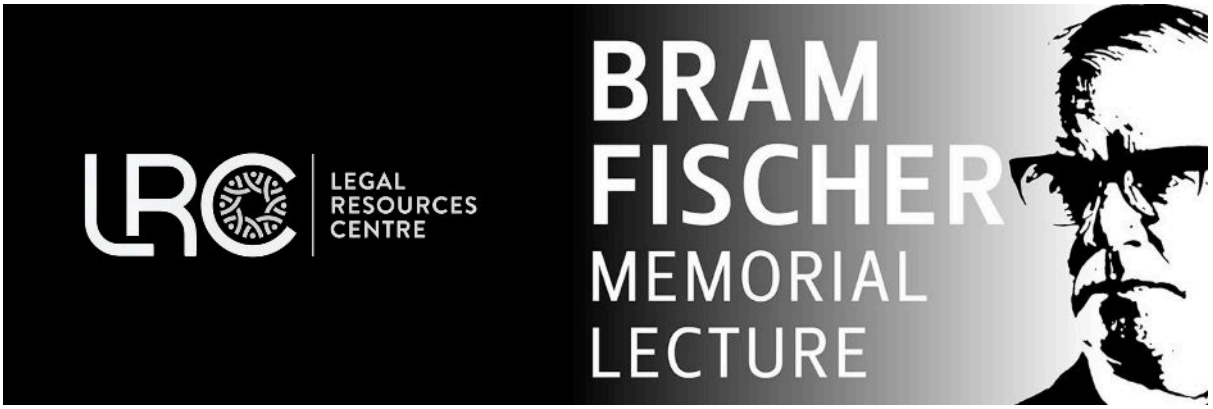
In the President of the RSA vs Hugo, Kriegler, J stated:

South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights, but in the light of our particular history and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitutions focus and its organising principle.

Transformative jurisprudence would support commitment to substantive equality. This approach looks askance at formal or notional equality. It requires an examination of the context of the violation of the right and its relationship to systematic forms of domination within a society. It addresses structural and entrenched disadvantages at the same time as it aspires to maximise human development. This approach takes seriously the indivisibility and interrelatedness of the fundamental rights inclusive of socio-economic rights. Unlike Classical liberal jurisprudence animated by individual autonomy, and protection of property, the attainment of collective good, through redistributive fairness in an open and accountable society, informs transformative jurisprudence.

The transformative enterprise is of course a legal enterprise and it occurs within the context of the law. Recognising the problem, which may emerge in the absence of judicial interpretative discipline, Kentridge AJ highlights the tension between the infinitely plastic and open-ended style of adjudication and the commitment to legal constrain. He states:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single ‘objective’ meaning. Nor is it easy to avoid the influence of ones personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.



Even so, personal intellectual and moral pre-conceptions of judges do intrude into their adjudication. Outside the terrain of Constitutional interpretation, judges also make value-laden choices in the routine of adjudication. They are responsible for the social and distributive consequences that result from these choices and should be judged accordingly. If so, adjudicators should perhaps acknowledge their political and moral responsibility in adjudication. They should strive for transparent justification of their judicial choices. Klare does no more than remind us that judicial decision makers have an 'inarticulate premise' and that such a premise is extra legal to the extent that it does not overtly form part of the rule of law, or the attendant factual context under consideration. The difficultly however, is that the politics or the values which a given judge would resort to are not readily transparent to the society it serves.

Which brings me to my final proposition The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with its transformative roles. The new legal order liberates the judicial function from the confines of the common law, customary law or statutory law or any other law to the extent of its inconsistency with the constitution. The is an epoch making opportunity which only a few, in my view, of the High Court judges have cared to embrace or grasp. A substantive, deliberate and speedy plan to achieve an appropriate shift of legal culture at the High Courts and Magistrate's Court is necessary. . After all, it is the Constitution, which confers substantial review powers on the judiciary. However, without an appropriate legal culture change the judiciary may become an instrument of social retrogression. In time will lose in constitutionally derived

It is appropriate to draw attention that the Constitution entrenches in conjunction with other fundamental rights, socio-economic rights, this approach is in keeping with the universal principle of interrelatedness of political and socio-economic rights; in fact of all fundamental rights. It has often been said that fundamental rights are not capable of meaningful enjoyment if not accompanied by substantive fulfillment of socio-economic rights. That is another way of saying that transformative adjudication must be put to the task of achieving in conjunction with other organs of the state and diverse organs of civil society social redistributive justice. The primary function of the Constitution is to intervene in unjust, uneven and impermissable power and resources distributions in order to achieve substantive equality permissive or tolerable in a country, which has committed to foundational values such as are to be found in our Constitution.

Much is to be said for the contextual approach in constitutional adjudication. The contextual approach posits that legal enquiry in adjudication should be migrated from abstract comparison of similarly situated individuals to an exploration of actual impact of the alleged rights violation within the existing socio-economic circumstances. This is also another way

of stating that transformative jurisprudence needs to contextualise violations within actual live conditions. Decisions on violation of constitutional rights must be seen in the context of socio-economic conditions of the groups concerned in the light of social patterns, power relations and other systematic forms of deprivation, which may be relevant. Also the historical context of the case must be heard.

In conclusion, we have briefly defined how the South African society has embarked on a constitutionally sanctioned transformative journey. The Constitution, which records the society's transformative intent, prescribes founding values, which are admittedly momentous but open ended. All organs of the State are enjoined by the Constitution to perform their functions in a manner consistent with the Constitution. The judiciary in particular, is vested with substantive powers of review over the exercise of public or private power. In my view, the judiciary is commanded to observe with unfailing fidelity the transformative mission of the Constitution.

Thus far, the Constitutional Court has in an admirable way grappled with complex jurisprudential issues spawned by our nascent constitutional setting. But in a few cases, the Constitutional Court, has crafted an impressive body of progressive constitutional jurisprudence true to the over arching constitutional enterprise of transforming our society into a democratic, non-racial, non-discriminating, egalitarian and socially just and caring society. Solid foundation blocks are in place. The edifice is rising. We must commit to built it to full height.

That would be the fondest tribute our country would pay to one of its finest sons and patriot, Bram Fischer.