

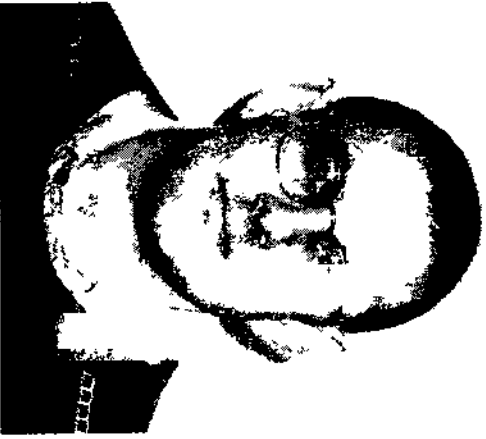
Conscience against the law: Mahatma Gandhi, Nelson Mandela and Bram Fischer as practising lawyers during the struggle

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*Ka mo sengvathweng se sebotse se go maki
sšwa histor ya Gandhi Mandela gannnogo
le Fischer bhalo ka boananelao ha go hwela
tokologo Banna ha bararo ha ka go ha
kgahlamong go bona le kgathello va semorale
le mabalo va kgathello va Afrika Banna ha ile
ha qapetsega go hlamanela molao wo ha
kannego go o hlomphe go hwela toka ya
mmole Ka ditshoko ka bona tšeo di bego di na
le dipolotiki ka gare ha ile ha faela dikgore
ba tsheko go ha mafelo a go hwela toka Ke
nako bhalo va gore le je sedt va rema go serō se
sonqwe wo se tšivšego maemo a bhalo a molao
mo Afrika Banna e lego serō wo se labetšwego
sa molao wa go ha kgahlamong wo o
tšivšego wa ha wa godišwa ke boananelao
ha bagole ha go hwela tokologo bhalo ka
Gandhi Mandela gannnogo le Fischer*

1 Introduction

In one of the first Constitutional Court judgments, Sachs J remarked that the secure and progressive development of our legal system demands that it draw the best from all the streams of justice in



our country.¹ He expanded on this comment by highlighting some of the neglected streams of justice which should, to his mind, serve as sources of values when a democratic South African jurisprudence is developed. Sachs listed firstly 'African law and legal thinking'.² Also on his list appeared two traditions of justice which were developed by small sections of the

legal community during apartheid. The first is the learning of those Judges who in the previous era managed to articulate a sense of justice that transcended the limits of race³ and the second the challenging writings of legal academics who bravely broke the taboos on criticism of the legal system.⁴

Sachs J could equally have made mention of the rich tradition of justice developed by practising lawyers like Mahatma Gandhi, Nelson Mandela and Bram Fischer in their struggle against racist oppression. The importance of these lawyers and the tradition of justice they represent have recently been acknowledged by the *Truth and Reconciliation Commission*. The Commission found that these lawyers were influential enough to be part of the reason why the ideal of a constitutional democracy as the favoured form of government for a future South Africa continued to burn brightly throughout the darkness of the apartheid era.⁵ This important point is further underscored by the fact that the

new Constitutional Court building will soon arise on the restored site of the Old Fort Prison in downtown Johannesburg in honour of Gandhi, Mandela, Fischer and the many other political prisoners who were detained there, at some point or another.⁶ The purpose of this essay is to briefly introduce the tradition of justice and the style of legal practice developed by Gandhi, Mandela and Fischer to law students who will soon be legal practitioners in their own right.⁷ Although the three men in question came from diverse cultural backgrounds they are united as lawyers by an unwavering commitment to justice (rather than to positive law) and a belief in the value of political action and participatory democratic citizenship.⁸

2 Practising law in a racist and oppressive state

Mahatma Gandhi⁹ came to South Africa in April 1893 as a disillusioned young

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2 Ibid.

3 Ibid.

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

9 Ibid.

lawyer. Hired by an international law firm to assist in a major case between two South African business interests, he hoped to make a fresh start. In India, his first steps as a legal practitioner were traumatic. His own inexperience were compounded by growing disappointment with the legal profession. He found being a barrister "a bad job – much show and little knowledge"¹⁰ and refused, on principle, to pay commission to people referring cases to him (a common practice of the day). As a result, the young Gandhi received little work. After six months, "the briefless barrister of Bombay", as he dubbed himself,¹¹ left for Rajkot from Bombay and again tried to set up a legal practice there. Gandhi was even more depressed by the atmosphere and politics of law in Rajkot. He discovered the power of colonial legal officials and learned that influence, rather than principle, counted in law. When his way to a successful legal practice in Rajkot was effectively barred because of a quarrel with a local official, Gandhi decided to take up the offer to come to South Africa.

In South Africa, Gandhi encountered many of the same attitudes amongst officials and colleagues that had disappointed him in India. At the same time, he forged the outlines of his own legal philosophy and approach to the practice of law. Unlike most of his peers, Gandhi regarded legal victories as hollow, and understood the task of a lawyer rather to reconcile the litigating parties and re-establish a lasting and amicable relationship between them. This meant exploring alternative dispute resolutions methods, like arbitration. Gandhi explored his approach to law with a great measure of success in the case for which

he was sent to South Africa. I can do no better than let Gandhi himself explain:¹²

The year's stay in Pretoria was a most valuable experience in my life. Here it was that I had opportunities of learning public work and acquired some measure of my capacity for it. Here it was that the religious spirit within me became a living force, and here too I acquired a true knowledge of legal practice. Here I learnt the things that a junior barrister learns in a senior barrister's chamber, and here I also gained confidence that I should not after all fail as a lawyer. It was likewise here that I learnt the secret of success as a lawyer.

Dada Abdulla's was no small case. The suite was for £40 000. Arising out of business transactions, it was full of intricacies of accounts. There were numerous points of fact and law in this intricate case. Both parties had engaged the best attorneys and counsel. I thus had a fine opportunity of studying their work. The preparation of the plaintiff's case for the attorney and the sifting of facts in support of his case had been entrusted to me.

When I was making preparation for Dada Abdulla's case, I had not fully realised the paramount importance of facts. Facts mean truth, and once we adhere to truth, the law comes to our aid naturally. I saw that the facts of Dada Abdulla's case made it very strong indeed, and that the law was bound to be on his side. But I also saw that the litigation, if it were persisted in, would ruin the plaintiff and the defendant, who were relatives and both belonged to the same city. No one knew how long the case might go on. Should it be allowed to continue to be fought out in court, it might go on indefinitely and to no advantage of either party. Both, there-

fore, desired an immediate termination of the case, if possible.

I approached Tyeb Sheth and requested and advised him to go to arbitration. I suggested to him that, if an arbitrator commanding the confidence of both parties could be appointed, the case would be quickly finished. The lawyers' fees were so rapidly mounting up that they were enough to devour all the resources of the clients, big merchants as they were. The case occupied so much of their attention that they had no time left for any other work. In the meantime mutual ill-will was steadily increasing. I became disgusted with the profession. As lawyers the counsel on both sides were bound to take up points of law in support of their own clients. I also saw for the first time that the winning party never recovers all the costs incurred. Under the Court Fees Regulation there was a fixed scale of costs to be allowed as between party and party, the actual costs as between attorney and client being very much higher. This was more than I could bear. I felt that my duty was to befriend both parties and bring them together. I strained every nerve to bring about a compromise. At last Tyeb Sheth agreed. An arbitrator was appointed, the case was argued before him, and Dada Abdulla won.

But that did not satisfy me. If my client were to seek immediate execution of the award, it would be impossible for Tyeb Sheth to meet the whole of the awarded amount, and there was an unwritten law among the Porbandar Merchants living in South Africa that death should be preferred to bankruptcy. It was impossible for Tyeb Sheth to pay down the whole sum of about £37 000 and costs. He meant to pay not a pie less than the amount, and he did not want to be declared bankrupt. There was only one way. Dada Abdulla should allow him to pay in moderate instalments. He was equal to the occasion, and granted Tyeb Sheth instalments

spread over a very long period. It was more difficult for me to secure this concession of payment by instalments than to get the parties to agree to arbitration. But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realised that the true function of a lawyer was to unite parties torn asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private conciliations of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.

Gandhi's attempts to practice law as the art of reconciliation stand in sharp contrast with the wide-spread racism and discriminatory laws which he, as an Indian person and lawyer, immediately encountered during his short stay in South Africa. On the second day after his arrival in South Africa, and on his first visit to a local court, Gandhi was ordered by a magistrate to remove the turban he was wearing. He refused, and had to leave court. Travelling from Durban to Pretoria shortly thereafter, to attend to the case for which he had come to South Africa, Gandhi was forcibly removed from a train in Pietermaritzburg because he was an Indian person. Later on, he was refused a seat inside a stage-coach in Charlestown – despite the fact that he had valid first class tickets. These incidents came to a head when, on the evening of his farewell party on his way to India, Gandhi happened by chance to read an article in a newspaper about proposed legislation removing the right of Indian people to vote.

Gandhi inquired about the Bill but discovered that the rest of the guests were equally ignorant of the proposed

¹⁰ Gandhi *An Autobiography* (n 8) at 78

¹¹ Gandhi *An Autobiography* (n 8) at 80

¹² Gandhi *An Autobiography* (n 8) at 109–112

legislation. This was a clear indication of the lack of political consciousness within the Indian business community. Very few Indians had up to then exercised their right to vote.¹³ The reply of Gandhi's host to his question about the Bill was typical of the prevalent attitude: "What can we understand in these matters? We can only understand things that affect our trade."¹⁴ Gandhi convinced the guests that they should take the matter seriously. That same evening it was decided that Gandhi would delay his departure for a month. A working committee was formed under his leadership to organise a campaign against the proposed legislation. Even though Gandhi stood to lose a lot in fees due to the delay in his return, he refused to receive any compensation from the local merchants: "There can be no fees for public work. I can stay, if at all, as a servant."¹⁵

During the next month Gandhi addressed a telegram to the Speaker of the Assembly, and had the debate on the Bill postponed. A petition was presented to the Legislative Assembly expressing the Indian community's objection to the Bill. The Bill was nevertheless passed. In spite of the apparent failure of the campaign, it was a turning point for the Indian community. Many volunteers were enrolled to assist in the campaign.

Private homes were converted into public offices. Gandhi introduced the value of a public spirit and political action to the Indian merchants who were otherwise only interested in furthering their private affairs:

They were all agreeably surprised to find themselves taking a share in public work. To be invited thus to take part was a new experience in their lives. In face of the clamour that had overtaken the community, all distinctions such as high and low, small and great, master and servant, Hindus, Musalmans, Parsis, Christians, Gujaratis, Madrasis, Sindhis, etc. were forgotten ... The agitation had infused new life into the community and had brought home to them the conviction that the community was one and indivisible, and that it was as much their duty to fight for its political rights as for its trading rights.¹⁶

Having politically mobilised the community, Gandhi found it impossible to leave Natal. He decided to settle in South Africa. While Gandhi still refused compensation for the public work he undertook, he accepted offers from twenty leading merchants to act as their lawyer. In this way, Gandhi intended to

combine his legal practice with his political activities. When Gandhi applied to be admitted as an advocate in the Supreme Court of Natal, his application was opposed by the Law Society of Natal.¹⁷ The opposition rested not on anything Gandhi had done, nor on his abilities as a lawyer: Gandhi was objected to because he was an Indian person.¹⁸ The presiding judge dismissed the racist objection but summarily ordered Gandhi to remove the turban he was wearing as part of his traditional dress. Gandhi this time obliged, deciding to focus his energy on the larger struggle that lay ahead.

Gandhi soon founded the *Natal Indian Congress* as a permanent organisation which could sustain the resistance against racism. Meetings were held frequently, and people soon acquired the habit of thinking and speaking publicly about matters of public interest. A truly democratic political culture of active participation and public debate developed in the Indian community under Gandhi's leadership. This culture soon developed into what has now become known as the *Satyagraha* movement of resistance.

In 1906, the Transvaal government

gave notice of a proposed ordinance, in terms of which all Indians were required to register and carry a certificate of registration at all times, on penalty of imprisonment or deportation from the Transvaal. A meeting was held in Johannesburg to discuss the so-called "Black Act". Thousands of Indians pledged before God to resist the proposed ordinance, whatever the personal hardships involved. A decision was taken not to submit to the ordinance if it became law. Gandhi referred to the intended action as "passive resistance".

The term was later replaced with the term *Satyagraha* (the force of truth, love or non-violence) and people who voluntarily participated in civil disobedience campaigns became known as *Satyagrahis*.¹⁹ The ideal of peaceful reconciliation (which informed Gandhi's approach to law and lawyering) thus became the key to his whole spiritual and political philosophy.²⁰

The "Black Act" came into operation in 1907. Very few Indians registered. Leaders of the community, including Gandhi, were ordered by the court to leave the Transvaal. When they failed to do so, they were brought before court to be tried and sentenced. All the accused

13 Only about 250 of the 46,000 members of the Indian community had registered as voters.
 14 Gandhi *An Autobiography* (n 8) at 115.
 15 Gandhi *An Autobiography* (n 8) at 116.
 16 Gandhi *An Autobiography* (n 8) at 117-118. Republican political thinkers from as far back as Aristotle (384BC-322BC) have consistently claimed that a life lived in the pursuit of private interests only is a defective life. Men, Aristotle (*The Politics* (1986) at 4) said, are by nature political beings who can only really be happy when they concern themselves with the public affairs and the common good of the community. Republican critics of liberalism, like H. Arendt (*The Human Condition* (1958)) and R. Sennett (*The Fall of Public Man* (1974)), have argued that the public domain has disintegrated in the modern state. At the same time, politics has become corrupted by a power struggle between private or sectional interests. The same process has been underway in South Africa. Thus A van der Walt "Un-dong things with words: colonisation of the public sphere by private property discourse", 1998 *Acta Juridica* 323 has shown how the attempt to regenerate a vibrant public law discourse after apartheid has fallen foul to the basic tenets of nineteenth century private law discourse. Gandhi could be regarded as a critic of this tendency and one of the champions of republican democracy in South Africa (but see G. Ashe (n 8) at 102 who suggests that truth and self-reliance, the basic ingredients of *satyagraha* or passive resistance, are not political concepts but rather elements of a religious creed).

17 *In re Gandhi* 1894 NLR 263.
 18 This fact is not reflected in the official case report. It is dealt with extensively in Gandhi's autobiography (n 8) at 121-123. The ground of objection dealt with in the case report is Gandhi's failure to submit proof that he was an admitted barrister in England.
 19 Gandhi (n 8) Jack (ed) *The Gandhi Reader* (1956) at 112-113 explains the method of *satyagraha* or passive resistance "as a method of securing rights by personal suffering. It is the reverse of resistance by arms. When I refuse to do a thing that is repugnant to my conscience, I use soul-force. For instance, the Government of the day has passed a law which is applicable to me. I do not like it. If by using violence I force the Government to repeal the law, I am employing what may be termed body-force. If I do not obey the law and accept its penalty for its breach, I use soul-force. It involves sacrifice of self ... When we do not like certain laws, we do not break the heads of law-givers but we suffer and do not submit to the laws". For a fuller discussion of the role of Gandhi in developing the idea of civil disobedience see C. Heyns *A Jurisprudential Analysis of Civil Disobedience in South Africa* (1991).
 20 G. Ashe (n 8) explains: "The *Satyagrahi*'s victory is not the opponents' defeat. It is the opponent's conversion. To endure blows long enough is to unnerve the arm that strikes them, and with one's directing mind. Victory does not mean that one side triumphs at the other's expense, but that both sides are reconciled in a new harmony, with the Wrong cancelled." The goal of the *Satyagraha*, as described here, closely resembles the goal of the good lawyer as described by Gandhi (see above). Gandhi regarded litigation as an exhibition of *dharmic force* which contrasts sharply with the exercise of soul or truth-force (*satyagraha*) (Gandhi "Indian Home Rule" in H. Jack (ed) *The Gandhi Reader* (1956) at 111).

pleaded guilty. Gandhi was sentenced to two months imprisonment. He later recalled the moment: "I had some slight feeling of awkwardness due to the fact that I was standing as an accused in the very Court where I had often appeared as counsel. But I remember that I considered the former role as far more honourable than the latter, and did not feel the slightest hesitation in entering the prisoner's box."²¹

Gandhi and the other *Satyagrahis* were imprisoned during which time Gandhi spent some time in the Old Fort Prison in Johannesburg. In the end their number totalled more than 150. Less than three weeks later, on 30 January 1908, General Jan Smuts reached a compromise with Gandhi whereby, if the Indians would register voluntarily, he would repeat the "Black Act". Gandhi and the other prisoners were released and wide-spread registration took place. General Smuts did not carry out his part of the compromise and no steps were taken to repeal the "Black Act". Dissatisfaction among the Indian community grew, and many were ready to resume the struggle and, if necessary, go to jail again. At a public meeting on 16 August 1908, certificates were collected and burned in an act of defiance. Thus the *Satyagraha* movement was re-launched.

In the period that followed many discriminatory laws were deliberately but peacefully disobeyed. The families of *Satyagrahis* were maintained at a settlement outside Johannesburg which

Gandhi named the *Tolskov* farm. The *Satyagrahis* continued to defy restrictive laws: they sold fruit without licenses to do so, and many crossed the border from Natal to the Transvaal without a permit. A large part of Gandhi's legal practice was devoted towards defending the *Satyagrahis* in court. The movement culminated in a Great March, led by Gandhi, from Newcastle in Natal to Standerton in the Transvaal. The march began on 6 November 1913. More than two thousand people set out on their

long walk in protest against a special tax imposed on indentured Indian labourers and the illegality of Muslim and Hindu marriages in terms of South African law.²² During the march Gandhi was arrested and released on bail three times. He was tried after the march and sentenced to a lengthy period of imprisonment. The same fate befell many of the other *Satyagrahis*. Then, on 18 December 1913, Gandhi and a number of other leaders were released from prison and a commission was appointed to investigate the grievances of the Indian community. After negotiations between Gandhi and Smuts, agreement was reached. The *Satyagraha* campaign would stop and an *Indian Relief Act* would be passed. The Act came into operation in July 1914 and brought some relief to the plight of the Indian community, including the abolition of the tax on indentured workers. Having achieved this partial victory, Gandhi resolved to leave South Africa forever. He departed on 18 July 1914

and became a leading figure in the liberation struggle of India. On Friday, 30 January 1948, Gandhi was assassinated in India on his way to the prayer ground.

The *Satyagraha* tradition of civil disobedience founded by Gandhi later served as one of the inspirations for the civil disobedience campaigns of the 1950's and early 1960's in which Nelson Mandela and Brann Fischer played important roles.²³

Nelson Mandela²⁴ was born on 18 July 1918. He had a traditional pastoral childhood in the Transkei. After attending a Methodist school, he went on to Fort Hare University to study for a BA degree. Mandela soon became embroiled in the politics of the day. In his third year, he was suspended for organising a student boycott. He went to Johannesburg where he joined the ANC in 1944, and helped to form its Youth League. In 1951 he completed his articles. He opened his own law firm in 1952. Shortly thereafter Oliver Tambo joined him as partner. Theirs was the first black law firm in South Africa:

'Mandela and Tambo' read the brass plate on our office door in Chancellor House, a small building just across the street from the marble statues of justice in front of the magistrates' court in central Johannesburg. From the beginning Mandela and Tambo was besieged with

clients. Africans were desperate for legal help in government buildings: it was a crime to walk through a Whites Only door, a crime to ride a Whites Only bus, a crime to use a Whites Only drinking fountain, a crime to walk on a Whites Only beach, a crime to be on the street after 11 pm, a crime not to have a pass book and a crime to have the wrong signature in that book, a crime to be unemployed and a crime to be employed in the wrong place, a crime to live in certain places and a crime to have no place to live. Every day we heard and saw the thousands of humiliations that ordinary Africans confronted every day of their lives.

Oliver had a prodigious capacity for work. He spent a great deal of time with each client, not so much for professional reasons but because he was a man of limitless compassion and patience. He became involved in his clients' cases and in their lives. He was touched by the plight of the masses as a whole and by each and every individual.

I realized quickly what Mandela and Tambo meant to ordinary Africans. It was a place where they could come and find a sympathetic ear and a competent ally, a place where they would not be turned away or cheated, a place where they might actually feel proud to be represented by men of their own skin colour. This was the reason I had become

21 H. Jack (ed) *The Gandhi Reader* (1956) at 67

22 The march was precipitated by judgement in the case *Egoy v Union Government (Minister of the Interior)* 1913 CPD 133 in which the court found that a woman married to a Indian immigrant in terms of "Mohammedan rites" could not be regarded as his lawful "wife" for purposes of the Immigration Act 30 of 1906 as the marriage was potentially polygamous. The Indian woman in question accordingly be deported to India. Gandhi interpreted the judgement to imply that all marriages not concluded in terms of Christian rites were null and void. Thousands of Indian wives were suddenly reduced to concubines. In protest, many Indian women joined the Great March. Either the court in the Transvaal held that "wife" for the purposes of immigration included one wife from a Mohammedan marriage, irrespective of how many wives there might be. See *Jamaji v Registrar of Assists* 1911 TPD 1180 and *R v Fatima* 1912 TPD 99.

23 An extensive exploration of the Gandhian roots of the Defiance Campaign falls outside the scope of this essay. Some have claimed that non-violence was transformed from a quasi-religious creed (as it was for Gandhi) to a tactic (as it was for the leaders of the Defiance Campaign). Nevertheless, in a paper on the Defiance Campaign one of the leaders of the Indian community, MP Nankar wrote: "In the detailed discussions that were held by the national Planning Council and the leadership of the ANC and the SA Indian Congress prior to the formulation of the plan of action, the efficacy of the Gandhian philosophy of *satyagraha* (ie changing the hearts of the rulers by passively suffering imprisonment) in the face of an avowedly fascist regime was discussed at length. Undoubtedly there was a very small minority who supported the Gandhian creed absolutely. But the vast majority agreed that the campaign itself could not defeat white supremacy." (quoted in Reddy (n 8) at 66).

24 Nelson Mandela's autobiography is entitled *Long Walk to Freedom* (1994). Biographies include F Meer Higher than Hope: the biography of Nelson Mandela (1990); M. Meredith Nelson Mandela: A Biography (1997)

a lawyer in the first place, and my work often made me feel I had made the right decision.²⁵

At the same time as Mandela was establishing his legal practice in Johannesburg, the ANC and a number of other organisations (including the Indian Congress originally founded by Gandhi) organised an extensive campaign of civil disobedience which came to be known as the Defiance Campaign. In 1952 Mandela was appointed in charge of all the volunteers who joined the campaign. "My life, during the Defiance Campaign, ran on two separate tracks: my work in the struggle, and my livelihood as an attorney" recalled Mandela later.²⁶ In a great surge of protest, men and women all over the country courted imprisonment. In disciplined groups they went through Europe's Only entrances to railway stations and post offices; African people broke the curfew laws; and a number of white people joined Indian *Satyagrahis* in illegally entering Black townships. In all, 8 500 went to jail until government legislation finally halted the campaign. Nelson Mandela was one of twenty leaders who were charged and convicted at the end of 1952 for organising the Defiance Campaign. He received a nine months suspended sentence. In addition, the government responded by issuing him with a banning order which prohibited him from attending gatherings and confined him to Johannesburg.

In 1954 the Transvaal Law Society applied to the Supreme Court to have Mandela struck of the roll of attorneys for his role in the Defiance Campaign of 1952.²⁷ The Society claimed that respect for the law was required from an attorney and that his participation in a campaign of deliberate civil disobedience made Mandela an unfit person to practise law as an attorney. Mandela argued that the application was an affront to the idea of justice and that he had a right to fight for his political beliefs, even though they were opposed to that of the government. The court agreed and dismissed the application.²⁸ Other leaders were simultaneously banned. In spite of these measures, a Congress of the People was established which eventually incorporated the ANC, the SA Indian Congress, the Coloured People's Congress, the (white) Congress of Democrats and the SA Congress of Trade Unions. At a mass meeting of more than three thousand people, the Congress movement adopted its own policy document on 26 June 1955 at Kliptown. The document was called the "Freedom Charter". The government reacted against the growing militancy and unity of the people and arrested 156 leaders, including Nelson Mandela, in December 1956. All those arrested were charged with treason. The defence team of the accused included a prominent Afrikaner lawyer – Bram Fischer.

Bram Fischer²⁹ was born on 23 April 1908 in Bloemfontein. He grew up in a prominent Afrikaner family and soon developed Afrikaner nationalist sentiments. In 1929 he became the student leader of the National Party. In the same year his father became a judge in the Supreme Court of the Orange Free State. He received a Rhodes Scholarship to study at Oxford University in 1930. By

the time he returned to South Africa in 1934, he had become interested in communism. In January 1935 Bram Fischer joined the Johannesburg Bar and quickly established himself as a successful advocate. At the same time he remained politically active, and joined the Communist Party of South Africa. In December 1945 Bram Fischer was elected to the central committee of the CP SA. At the same time, legal work streamed in. Fischer started experiencing difficulties in combining his practice and his anti-apartheid political activities. Predictably, he became a target of the National Party government. In 1950 the Suppression of Communism Act provided for the liquidation of the Communist Party. Fischer was listed in 1951 as a communist and received the first of many banning orders on 20 August 1953.

Lawyers like Nelson Mandela and Bram Fischer practised law at a time when the resistance campaigns of the 1950's led to a direct confrontation between the defenders and the challengers of the apartheid regime. The site of the struggle became the courts of the land. Thousands of people were arrested for deliberately and conscientiously, but peacefully, breaking apartheid laws. The legal community inevitably became embroiled in the political struggle. The apartheid government decided to conveniently use the courts to try and crush the liberation movement. Hundreds of legally skilled prosecutors, magistrates and judges obliged by trying and sentencing political objectors to various terms of imprisonment. The majority

of lawyers, inadvertently or not, sanctioned the abuse of the courts by continuing with their legal practices as if the crisis did not exist. The support that their silence or inaction lent to the apartheid regime cannot be discounted.³⁰



Lawyers under apartheid arrogant indifference and the struggle for justice

In this context lawyers like Nelson Mandela and Bram Fischer stand out. They understood it as their professional duty to actively oppose the apartheid laws and the abuse of the legal process in a purely political struggle. They refused to be the "rubber stamps of an immoral regime" as Nelson Mandela referred to many other members of the legal profession.³¹ Active opposition in this regard meant, in the first place, using their knowledge, skills and influence as lawyers to assist in the organi-

25 Mandela *Long walk to Freedom* (n 23) at 172-173

26 Mandela *Long walk to Freedom* (n 23) at 170

27 *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (TPD).

28 Ransbotton J held that the conduct in question was not committed by Mandela in his professional capacity, that he had already been punished for his conduct and that his conduct in any case did not disclose a character which would make Mandela unworthy of the honourable profession of attorney.

29 S Clingman *Bram Fischer: Afrikaner Revolucionary* (1998)

30 The Truth and Reconciliation Commission *Truth and Reconciliation Commission Report* (n 5) par 33 puts it much stronger: "The courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice, as was pointed out by a few at the time and acknowledged by so many at the hearing. Perhaps the most common form of subservience can be captured in the maxim *qui facit consentire* (silence gives consent). There were, nevertheless, many parts of the profession that actively contributed to the entrenchment and defence of apartheid through the courts."

31 Mandela (n 24) at 190

sation of the political resistance. This meant for Mandela and Fischer (as for Gandhi before them) that their legal practices became but one part of their politically active lives.

Legal work, in the second place, frequently took the form of defending friends and strangers who had been arrested and dragged before court for acts of civil disobedience based on their political convictions. Thus Bram Fischer ended up in 1958 as part of the defence team for Nelson Mandela and his fellow accused.

The Treason Trial dragged on for more than four years. Finally, in 1961 all the accused were acquitted as the state could not prove its theory that the ANC and its allies were part of a communist inspired effort to overthrow the government with violence.

As the trial drew to a close, the shooting incident at Sharpeville took place.³² A state of emergency was called and a new round of arrests was instigated. Mandela was forced to go underground in order to escape arrest. This meant the end of his legal practice. Mandela managed to continue with his political activities and organised a three day strike to coincide with the establishment of South Africa as a republic on 31 May 1961. Six months later, in December 1961, sabotage marked the emergence of *Umkhonto we Sizwe* as government installations were attacked. This ended the period of peaceful resistance and introduced the armed struggle. Mandela's life underground ended on 5 August 1962 when he was captured in Natal. He was charged with inciting Africans to strike and leaving the country without a passport (he travelled through Africa, amongst others to Addis Ababa in Ethiopia). Appreciating the difficult position that

the apartheid legal order placed him as lawyer, Nelson Mandela took time to explain his position in an address to the court. I quote his important words at length:³³

This court has found that I am guilty of incitement to commit an offence in opposition to this law as well as of leaving the country.

The court is aware of the fact that I am an attorney by profession and no doubt the question will be asked why I, as an attorney who is bound, as part of my code of behaviour, to observe the laws of the country, and to respect its customs and traditions, should willingly lend myself to a campaign whose ultimate aim was to bring about a strike against the proclaimed policy of the government of this country.

Right at the beginning of my career as an attorney I encountered difficulties imposed on me because of the colour of my skin, and further difficulty surrounding me because of my membership and support of the African National Congress. I discovered, for example, that, unlike a white attorney, I could not occupy business premises in the city unless I first obtained ministerial consent in terms of the Urban Areas Act. I applied for that consent, but it was never granted. Although I subsequently obtained a permit, for a limited period, in terms of the group Areas Act, that soon expired, the authorities refused to renew it. They insisted that my partner, Oliver Tambo, and I should leave the city and practise in an African location at the back of beyond, miles away from where clients could reach us during working hours. This was tantamount to asking us to abandon our legal practice, to give up the legal service of our people, for which we had spent many years training. No

attorney worth his salt will agree easily to do so. For some years, therefore, we continued to occupy premises in the city, illegally. The threat of prosecution and election hung menacingly over us throughout that period. It was an act of defiance of the law. We were aware that it was, but, nevertheless, that act had been forced on us against our wishes, and we could do no other than to choose between compliance with the law and compliance with our conscience.

In the courts where we practised we were treated courteously by many officials but we were very often discriminated against by some and treated with resentment and hostility by others. We were constantly aware that no matter how well, how correctly, how adequately we pursued our career of law, we could not become a prosecutor, or a magistrate, or a judge. We became aware of the fact that as attorneys we often dealt with officials whose competence and attainments were no higher than ours, but whose superior position was maintained and protected by a white skin.

I regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law and to justice for all mankind, to cry out against this discrimination, which is essentially unjust and opposed to the whole basis of the attitude towards justice which is part of the tradition of legal training in this country. I believed that in taking up a stand against this injustice I was upholding the dignity of what should be an honourable profession.

Nine years ago the Transvaal Law Society applied to the Supreme Court to have my name struck off the roll because of the part I had played in a campaign initiated by the African National Congress, a campaign for the Defiance of Unjust Laws. During the campaign more than eight thousand of the most advanced and farseeing of my people deliberately courted arrest and imprison-

ment by breaking specified laws, which we regarded then, as we still do now, as unjust and repressive. In the opinion of the Law Society, my activity in connection with that campaign did not conform to the standards of conduct expected from members of our honourable profession, but on this occasion the Supreme Court held that I had been within my rights as an attorney, that there was nothing dishonourable in an attorney identifying himself with his people in their struggle for political rights, even if his activities should infringe upon the laws of the country; the Supreme Court rejected the application of the Law Society.

It would not be expected that with such a verdict in my favour I should discontinue my political activities. But Your Worship may well wonder why it is that I should find it necessary to persist with such conduct which has not only brought me the difficulties I have referred to, but which has resulted in my spending some four years on a charge before the courts of high treason, of which I was subsequently acquitted, and of many months in jail on no charge at all, merely on the basis of the government's dislike of my views and of my activities during the whole period of the Emergency of 1960.

Your Worship, I would say that the whole life of any thinking African in this country, drives him continuously to a conflict between his conscience on the one hand and the law on the other. This is not a conflict peculiar to this country.

The conflict arises for men of conscience, for men who think and who feel deeply in every country. Recently in Britain, a peer of the realm, Earl Russell, probably the most respected philosopher of the Western world, was sentenced, convicted for precisely the type of activities for which I stand before you today, for following his conscience in defiance of the law, as a protest against a nuclear weapons policy being followed by his own government. For him, his duty to the public, his belief

32 21 March 1960

33 Mandela (n 24) at 148-154.

in the morality of the essential rightness of the cause for which he stood, rose superior to this high respect for the law. He could not do other than to oppose the law and to suffer the consequences for it. Nor can I. Nor can many Africans in this country. The law as it is applied, the law as it is written and designed by the Nationalist government, is a law which, in our view, is immoral, unjust, and intolerable. Our consciences dictate that we must protest against it, that we must oppose it, and that we must attempt to alter it.

Here we, the African people, and especially we of the National Action Council, who had been entrusted with the tremendous responsibility of safeguarding the interests of the African people, were faced with this conflict between the law and our conscience. In the face of the complete failure of the government to heed, to consider, or even to respond to our seriously proposed objections and our solutions to the forthcoming republic, what were we to do?

This is the dilemma which faced us, and in such a dilemma, men of honesty, men of purpose, and men of public morality and of conscience can only have one answer. They must follow the dictates of their conscience irrespective of the consequences which might overtake them for it. We of the Action Council, and I particularly as Secretary, followed my conscience.

Mandela was sentenced to six years imprisonment.

In July the following year (1963) the police raided the Lilliesleaf farm in Rivonia and arrested a number of underground leaders and confiscated important documents dealing with the armed struggle. The Rivonia Trial opened in Pretoria on 9 October 1963. Nelson

Mandela was brought from prison and charged with the other leaders as accused number one. Bram Fischer led the team for the defence. All but one of the accused were found guilty of sabotage, and sentenced to life imprisonment. Nelson Mandela was released in 1990, nearly 27 years later and in 1994 became the first democratically elected president of South Africa.

After the Rivonia Trial, the police concentrated their attention on Bram Fischer. He was arrested on 23 September 1964 and charged under the Suppression of Communism Act together with ten other leaders. This time Bram Fischer was accused number one. He was held in the Old Fort Prison in Johannesburg. Bram applied for bail as he had a case scheduled in London before the Privy Council. Bail was granted. The case in London was to be Fischer's last as a lawyer. He returned to stand his trial but later found that circumstances had changed. Fischer felt that it was no longer possible to combine the role of a lawyer and political activist. On 24 January 1965 he did not arrive at court. A letter was read on his behalf. In it he explained that he wished to continue the political work which he believed was essential: "I can no longer serve justice in the way I have attempted to do during the past thirty years. I can only do it in the way I have now chosen".³⁴

Two days later the Johannesburg Bar Council decided to institute proceedings in the Supreme Court to have him removed from the roll of advocates on the grounds that Bram Fischer's "recent conduct is unbefitting that of an advocate". Again Bram defended his actions in a letter: "When an advocate does what I have done, his conduct is not determined by any disrespect for the law nor because he hopes personally to benefit by any 'offence' he

may commit. On the contrary, it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that, whatever the consequences to himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to act otherwise would, for him, be immoral."³⁵

On 2 November 1965 Bram Fischer was struck from the roll of advocates in his absence.³⁶ Fischer's life as an underground activist ended shortly thereafter when he was arrested on 11 November 1965. This time he was charged with sabotage – the same charge faced by the Rivonia trialist which he defended merely a year before. He pleaded not guilty to the charges. After the state's case was presented, Bram Fischer decided not to testify but to make a statement from the dock. Like Mandela, he took pains to explain why he as lawyer felt compelled to disobey the law which it would otherwise his duty as a lawyer to defend:

I am on trial, my Lord, for my political beliefs and for the conduct which those beliefs drove me to. My Lord, whatever labels may have been attached to the fifteen charges brought against me, they all arise from my having been a member of the Communist Party and from my activities as a member. I engaged upon those activities because I believed that, in the dangerous circumstances which have

been created in South Africa, it was my duty to do so.

My Lord, when a man is on trial for his political beliefs and actions, two courses are open to him. He can either confess to his transgressions and plead for mercy, or he can justify his beliefs and explain why he has acted as he did. Were I to ask for forgiveness today, I would betray my cause. That course, my Lord, is not open to me. I believe that what I did was right, and I must therefore explain to your Lordship what my motives were; why I hold the beliefs that I do, and why I was compelled to act in accordance with them.

My belief, moreover, my Lord, is one reason why I have pleaded not guilty to all the charges brought against me. Though I shall deny a number of important allegations, this Court is aware of the fact that there is much in the State case which has not been contested.

My Lord, there is another reason, and a more compelling reason for my plea and why even now I persist in it. I accept, my Lord, the general rule that for the protection of a society laws should be obeyed. But when the laws themselves become immoral, and require the citizen to take part in an organised system of oppression – if only by his silence and apathy – then I believe that a higher duty arises. This compels one to refuse to recognise such laws.

The law, my Lord, under which I have been prosecuted, was enacted by a wholly unrepresentative body, a body in which three-quarters of the people of this country

³⁵ *Society of Advocates of South Africa (Wintatersrand Division) v Fischer* (n 33) at 135H.

³⁶ *Society of Advocates of SA (Wintatersrand Division) v Fischer* (n 33). The court held that Fischer had made use of his status as a senior counsel to obtain bail and his breach of his solemn undertaking to stand his trial was dishonest and dishonourable conduct (136H). Furthermore, Fischer made it clear that his political beliefs were such that he was not prepared to conform to the laws of his country. The court held that it is the duty of an advocate and attorney to further the administration of justice in accordance with the laws of the country and not to frustrate it (137E). It would be inconsistent with that duty to allow an advocate (or attorney) to remain on the roll when he or she is openly defying those laws (137D). For this reason, the court concluded, Nelson Mandela ought also to have been struck from the roll when the application to that effect served before the court in 1954 (137F-G). In the *Truth and Reconciliation Commission Report Volume 4* par 34 J this incident is highlighted as one example of the way in which the legal profession connived in the pursuit of injustice.

³⁴ The letter is quoted in *Society of Advocates of South Africa (Wintatersrand Division) v Fischer* 1966 (1) SA 133 (TPD) at 137C.

have no voice whatever. This and other laws were enacted not to prevent the spread of Communism, but, my Lord, for the purpose of silencing the opposition of the large majority of our citizens to a government intent upon depriving them, solely on account of their colour, of the most elementary human rights: of the right to freedom and happiness, the right to live together with their families wherever they might choose, to earn their livelihoods to the best of their abilities, and to rear and educate their children in a civilised fashion; to take part in the administration of their country and to obtain a fair share of the wealth they produce; in short, my Lord, to live as human beings.

My conscience, my Lord, does not permit me to afford these laws such recognition as even a plea of guilty would involve. Hence though I shall be convicted by this Court, I cannot plead guilty. I believe that the future may well say that I acted correctly.³⁷

Bram Fischer was sentenced to life imprisonment. He died on 8 May 1975 of cancer, still a prisoner.

3 Conclusion

After South Africa's transition to democracy in 1994, a *Truth and Reconciliation Commission* was created to establish as complete a picture as possible of the injustices of the past, and the factors that contributed to those injustices. The

Commission found that the legal community stood to blame for the role it played during the years of apartheid. The legal community, either through active support or silent inaction, lent a measure of legitimacy to the apartheid regime. What lawyers should have done, the Commission held, was to strip the Emperor of his clothes and to expose the naked power and violence upon which the apartheid regime was founded.³⁸

Mahatma Gandhi, Nelson Mandela and Bram Fischer each in their own way tried to oppose racism in South Africa. In doing so, all three men, at one point or another, had to turn against the law to which they had sworn allegiance when they entered the legal profession. All three claimed, in doing so, that their duty as lawyers was to serve justice, not the existing law. All three practised law, not for the money, status, power or any other instrumental reason, but as an integral part of an active political life directed towards the public good. Mandela and Fischer, either as accused or as defence counsel, played a major role in most of the important political trials of the late 1950s and early 1960s. In this they were inspirational to a younger generation of lawyers who joined in the work, including George Bizos, Sidney Kentridge (founder of the *Legal Resources Center* and later acting Constitutional Court judge) and Arthur Chaskalson (who became the first President of the

Constitutional Court). Through their skill, these liberation lawyers managed to turn the already politicised courts into sites of resistance. These trials became highly publicised affairs, and provided an international forum for leaders, who were otherwise banned and silenced, to publicly voice their objections to the apartheid order. Outside the legal forum, these lawyers dedicated their lives to politics and played key roles in the planning of the struggle.

At his final court appearance, Bram Fischer claimed that history will show that he (and others like him, such as Gandhi and Mandela) had acted correctly. It is now more than 35 years later. It is time for you to judge the roles that Gandhi, Mandela, Fischer and their judges, prosecutors and colleagues had played during the first half of the 20th century in the development of the South African legal order. That judgement won't have any direct bearing on the

academic and judicial refinement and development of the substantive rules of the Roman-Dutch legal tradition during the same period. It will, however, direct attention to another tradition which contributed to the present South African legal order. It is the (largely neglected) tradition of struggle law, as developed by liberation lawyers such as Gandhi, Mandela and Fischer. The decision to reconstruct the new Constitutional Court-building on the reconstructed site of the Old Fort Prison in down-town Johannesburg, where all three men were detained at different times, embraces this tradition as a permanent and integral part of the democratic legal order of South Africa. This brave move reminds us of the urgency to assess the meaning of that tradition, to establish its strengths and weaknesses and to reflect on ways in which it should inform the practice of law in post-apartheid South Africa.

37 Quoted in Clingham (n 28) at 409-410. Both Bram Fischer and Nelson Mandela (as did Gandhi before them) appeared to their consciences as reservoir of justice in a situation where the law had become unjust. It is an open question whether an individual's own subjective conscience provides sufficient ground for the systematic violation of the law. For an interesting explanation of this question in the case of another esteemed profession see R Atkinson "How the Butler was made to do it: the perverted professionalism of The Remains of the Day", 1995 *Yale Law Journal* 177-220. Hannah Arendt, German American political philosopher, has also appealed to the conscience of individual persons as the only moral hope during the height of 20th century totalitarianism in Nazi Germany (*The Life of the Mind*, Vol 1 - *Thinking* (1978)). She has been criticised by fellow Germans like Albrecht Wellmer for placing her hope on such an unfirm subjective ground instead of on the inherent rationality of intersubjective democratic dialogue and debate ("Hannah Arendt on judgement: The unwritten doctrine of reason", in L. May *Hannah Arendt: twenty years later* (1996)).

38 *Truth and Reconciliation Report*, Volume 4 (1988) par 38.