

## **LAWYERS AND DICTATORS: TEN LAWYERS, AND COUNTING**

**John William Perry AO QC Oration**

**The Hon Justice Robert Beech-Jones\***

This speech is basically the story of a few lawyers. I will mention ten in total, and three in some detail. With one exception, they are all male. To that failing I confess, but I also avoid by pleading that the bias is that of history rather than mine. You be my judge.

The first of these ten lawyers is, of course, the late Justice John Perry whom this speech honours. As I understand it, he would have preferred to have been called Justice Pieris because, as most of you know, Peiris was his father's original surname when he arrived in Australia from Cyprus in the 1920s. Prior to preparing for this speech, I only knew of John Perry through his proudest role, namely, his status as the father of the second of the ten lawyers I will mention, Melissa Perry, that is, Justice Perry of the Federal Court of Australia. However, I have since learnt about John Perry's contributions to the law and South Australian society, which were so vast they cause you to reassess what you have done with your own life.

The third lawyer I will mention is the late Justice Malcom Blue who passed away on 7 September this year. I suspect his death has cut hard into the local legal community, especially the judiciary. Previously I only knew of his qualities as a judge from his fine judgments and his reputation for dealing with difficult cases with a minimum of fuss. However, in August this year all the members of the High Court met Malcolm in Adelaide as he was just about to embark on a well-earned retirement. We learnt what a wonderful colleague he was to his fellow judges. I pass on the condolences and respects of the entire High Court to his family, friends, and the South Australian legal community.

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A few weeks ago, I ran into a judge from South Australia who shall remain nameless. He is not one of the ten lawyers. That judge said this was a great crowd who likes a good laugh so to not be afraid to throw in a couple of jokes. By then the speech was mostly done. As you will realise, jokes are hard to fit. So let me say at the outset that I am sorry but the speech is a bit grim. It is a bit grim because it is meant to be a reflection of our times and, in particular, the threats liberal democracies face, not in this country, or at least not yet, but definitely overseas.

I do not think it is too alarmist to see the slide towards autocracy in countries, including those with strongly established democratic traditions, as deeply disturbing. It is not just the rise of a particular individual or party that is the concern, although that is part of it. What we are witnessing is the success of methods of gaining and exercising power that are reminiscent of an evil past: the harvesting of outrage, grievance, and hate; the denigration of the weak and the vulnerable; the rejection of democratic norms; the perpetuation of lies on a grand scale and the use of violence.

This speech is not about lawyers who facilitate dictators. It also not about ultimately achieving justice or vindication. This is not a tale of the Nuremberg trials or the International Criminal Court. In fact, spoiler alert, for most of the lawyers that I mention from now on things do not end well. Instead, this is a speech about how some lawyers responded when they were confronted with the developments of the kind we see unfolding overseas. Both of the main stories start with a subpoena, but first let me briefly mention the fourth and fifth lawyers of the ten; the most famous advocates of ancient times, Demosthenes and Cicero.

## **Two Ancient Lawyers**

Demosthenes was the ultimate teenage nightmare. He spent his youth gathering evidence and practising his oratory so that when came of age he could sue his guardians for plundering his inheritance. He duly came of age, sued them, won and the rest, as they say in the podcast, is history. That one of the most famous lawyers in all of history started out as a probate lawyer will no doubt warm the hearts of suburban solicitors everywhere.

Plutarch paired Demosthenes and Cicero in his famous book entitled *Parallel Lives*. It is not hard to see why. Both were powerful lawyers who moved into politics using their skills of oratory, persuasion, and negotiation. Both suffered similar fates and for similar reasons.

Demosthenes used those skills over decades to resist Macedonian influence in Athens. Between around 351BC and 340BC he delivered four fiery speeches railing against Alexander the Great's father, Phillip II of Macedonia. Those speeches became known as his *Philippics*. Three hundred years later, after the death of Caesar, as Cicero worked to restore the Roman Republic he delivered 14 powerful speeches railing against Mark Antony as the coming dictator to be feared. Cicero called those speeches his *Philippics* in honour of Demosthenes.

Both Demosthenes and Cicero failed in the end, but it was not for want of trying. As the Macedonians closed in to capture Demosthenes, he poisoned himself. Antony made sure that Cicero was on the top of the death list when he formed a triumvirate with Octavian and Lepidus. Cicero's death came when Antony's troops captured him at his villa. He was reading Medea, another Greek connection.<sup>1</sup>

Demosthenes and Cicero were no angels; they were very much political players in their own right. Still, wielding only the skills of a lawyer they proved formidable opponents to those who wielded armies and they each did so in pursuit of an ideal. Athenian democracy and Roman republicanism are very imperfect analogies to the liberal democratic traditions that are endangered today. But Demosthenes and Cicero's experiences at least tell us that the threats now being faced, and the question of what lawyers might or will do in the face of those threats, are not new.

### **Hans Litten's Subpoena**

If you were to write a book entitled *History's Greatest Subpoenas* I doubt that it would be a best seller, but I do know which subpoena would be at the top of the list. On the 7 April 1931, the sixth lawyer I will mention, Hans Litten, applied to a Berlin court<sup>2</sup> for the issue of a summons to give evidence. The summons was addressed to a person whose occupation was boringly described as "party employee". That party employee

was none other than one Adolf Hitler who was just 20 months away from gaining power. Surprisingly, the application for the summons was granted, and the witness' appearance was set for 8 May 1931.

### *The Lawyer, The Witness and The Trial*

Hans Litten was about to turn 29 at the time of that trial. His father was a highly respected Professor of Law who had converted from Judaism to the Evangelical Church so that he could enter the German officer corps.<sup>3</sup> Litten's father had the political outlook of a Prussian military officer and he returned from the first world war embittered and more reactionary than when he left.<sup>4</sup> Hans Litten's mother on the other hand was a highly intelligent and independent woman with progressive views.<sup>5</sup> While Hans may have been estranged from his father, the apple fell close to his mother's tree.

As often happens in legal families, Hans Litten became a lawyer to spite his father and not because of him. He enrolled at the University of Königsberg where his father taught. To the amusement of his classmates, Hans and his father often engaged in heated debates during class.<sup>6</sup>

In 1928 Litten was admitted as a lawyer and started his career acting for left wing activists in the hotbed that was Berlin.<sup>7</sup> By this time Hitler was seeking the support of the middle class. To reassure them, he had announced that his party was pursuing a policy of seeking power by legal means. However, in Berlin, which was the stronghold of the Communists and the Social Democrats, the strategy was to have the Nazi paramilitary wing, the SA, take the fight to the streets; literally, fighting it out one beer hall at a time.

On the night of 22 November 1930, members of the SA attacked a dance being held at a left-wing social club known as the Eden Dance Hall palace. Three men suffered shotgun wounds and four members of the SA were charged.

Litten was retained by the victims of the shooting in a private prosecution that took place alongside the state prosecution.<sup>8</sup> The two sets of prosecutors were not happy

partners. Litten and his allies thought that, like the police, the state prosecutor was too soft on the Nazis and the SA.

So why subpoena Hitler? Well, it seems his evidence was said to be relevant to proving the intention of the defendants in attacking the dance hall; was this a random shooting or the implementation of a strategy of violence that came from the top of the Nazi Party?<sup>9</sup> By our standards this had more than a hint of an abuse of process. Litten wanted to discredit Hitler's supposed adherence to legality. As an indication of the machinations taking place, while Litten may have despised the state prosecutor, he was co-operating with the lawyer for the defendants. The local SA had their own agenda. They wanted Hitler to be seen as a hypocrite, abandoning the SA when all along he had approved its methods.<sup>10</sup>

### *The Cross-Examination*

So, Hitler attended court. There is no official transcript of the trial, but Litten's biography contains a transcript compiled from various sources including the extensive press coverage.<sup>11</sup>

At the commencement of the questioning, the presiding judge<sup>12</sup> asked questions of Hitler that were submitted by Litten. They were open ended and seem intended to invite a declaratory speech by the witness for Litten to later pick apart in detail. Hitler duly obliged. He was asked whether the SA unit the defendants belonged to were "deliberately organised with the goal of carrying out planned and premeditated killings". Hitler denied that emphatically. He said that the Nazi Party "utterly reject[ed] violent methods",<sup>13</sup> the "National Socialists [were] fundamentally legal"<sup>14</sup> and that he was "taking the legal path on the basis of [his] deep convictions".<sup>15</sup>

Litten took up the questioning and sought to destroy Hitler's assertions about the Nazi Party's supposed rejection of violence. Litten referred Hitler to a speech by Joseph Goebbels where he coined the slogan "[t]he enemy must be beaten to a pulp", which Hitler said was not to be taken literally.<sup>16</sup> Isn't it amazing how violent language can get taken out of context?

Litten had the presiding judge pose two particular questions for the witness. The first question concerned a book published by Goebbels promoting revolution to gain power.<sup>17</sup> Hitler was now in a corner. He threw Goebbels under a bus. He declared Goebbels' book to be "entirely without value for the [Nazi] Party, since [it did] not bear the [Nazi] Party emblem" and was not "officially sanctioned".<sup>18</sup> Litten pointed out that the book was published after Goebbels was made party boss in Berlin. Was Goebbels disciplined for his book or forbidden to disseminate it, Litten asked? Hitler began to stutter and search for an answer before responding "I don't know". His answer seems meek on the page, but he was simmering and about to explode.<sup>19</sup>

The other question was a real doozy. It was also posed on Litten's behalf by the presiding judge:

"Did you promise Reich Chancellor Brüning to dissolve the SA in the event of your joining the administration?"

The judge explained to Hitler: "[t]he ... question is supposed to show that you yourself saw the SA as something illegal".

This claim was potentially dynamite. Brüning had been appointed interim Chancellor. Clearly the Nazis were on the rise but a suggestion that they were trying to get close to power via an alliance with a centrist regime by jettisoning the SA would have been explosive.<sup>20</sup> Hitler denied the suggestion. The transcript in Litten's biography records that he became "extraordinarily excited". He declared that "[d]issolving the SA would mean for me the end of the [Nazi] Party".<sup>21</sup> With the benefit of hindsight we know that three years later he did exactly that; he dissolved the SA, and had its leadership executed.

After lunch other witnesses were examined before Litten had Hitler recalled. Hitler was asked whether he maintained his commitment to the path of legality. He confirmed he did. Litten returned to Goebbels' book. He reminded Hitler that it was sold at all party meetings and bookstores. Hitler was reduced to saying it was not an official text because it did not bear the printed seal of the Nazi Party. By this point Hitler was said

to have lost all his composure and was screaming.<sup>22</sup> Over Litten's objection the presiding judge intervened and brought the questioning to an end.<sup>23</sup>

The Weimer Republic's judicial system was very different to ours, and it is now almost a hundred years later, but from here this looks like a textbook example of how to make a witness hang themselves. If ever there was a witness who could not resist an opportunity to make a speech from the witness box it was Adolf Hitler. The cross-examination started with open ended questions allowing Hitler to dig himself in and then confronted him with contradictory details. The questions did not just undermine Hitler's assertions about the path of legality; they undermined him as a leader. Here was the great leader of the Nazi Party, the saviour of the country, disowning his subordinates, denying that he controlled the party he formed in his own image and losing his nerve under pressure. Luckily, no modern examples spring to mind.

### *The Aftermath*

Although the Nazi press tried to put a positive spin on Hitler's testimony, it was a public relations disaster. The press was saturated with stories about Hitler's loss of composure and questions about his honesty in asserting his commitment to legality.<sup>24</sup>

The verdicts in the trial a few weeks later might have softened the blow a bit. The Court did not accept that the defendants attacked the dance hall as part of a specific strategy.<sup>25</sup> By all accounts, the presiding judge was fair, careful, and conscientious, something Germany was to sorely miss in the coming years. The defendants were convicted of breaches of the peace and trespassing and sentenced to terms of imprisonment.<sup>26</sup>

The judges criticised Litten for conducting a public meeting to get witnesses to come forward and share their stories as it was said that could have tainted their evidence.<sup>27</sup> Sounds like some of today's true crime podcasts. But this was the least of Litten's problems. He was now a marked man. His father was denounced as Jewish in the right-wing press, which led to a final break between father and son.<sup>28</sup>

### *Incarceration and Death*

By now it was 1932. In July, the Nazis secured 37% of the vote. They went backwards in the November election, but still, in January 1933 Hitler was invited in as Chancellor by people who laughed at him behind his back and thought they could control him.

A month later the Reichstag conveniently burnt down. The Nazis did not let such a good opportunity go to waste and the round ups commenced. Litten was arrested along with thousands of leftists, artists, journalists, and lawyers. I am sure the headlines said, "the elites had it coming".

Litten was shuffled between concentration camps and suffered beatings, forced labour and isolation. His mother worked tirelessly for his release, writing to all and sundry in Germany and overseas. But the witness on the receiving end of his cross-examination was never letting him out. The evidence is very strong that it was Hitler who wanted Litten incarcerated. All requests for Litten's release were referred to Hitler and refused.<sup>29</sup>

Eventually, Litten was moved to Dachau and segregated with other prisoners deemed to be Jewish. On 5 February 1937 Litten was found hanged in his cell.<sup>30</sup> Ten days later his mother and brother fled Germany. She kept fighting. In 1940 she published a book *Die Hölle sieht dich an: Der Fall Litten*, or "*A Mother Fights Hitler*" and she broadcast on the BBC. After the war she lectured German prisoners of war on anti-fascism.<sup>31</sup>

### *Posthumous Treatment*

It would be wrong to treat Litten as a hero of the lost Weimer Republic. His sympathies were with the far left and the Weimar Republic delivered little for his generation other than chaos and poverty. Some of Litten's former clients and associates who survived the war became functionaries in the German Democratic Republic. The GDR's main magistrates court in East Berlin was located on Hans Litten Street with a statue of him erected outside.



There has been a debate about this, but I think it likely that the ghastly prison that East Germany became would have horrified Litten. The unedited version of his mother's book spoke of his conflict with the Communist Party's hierarchy. His preferred company were non-conformist types and he had deep religious convictions. Everything about Litten shouts contrarian. Even though the East German regime collapsed, again, after some debate, the street name Litten remained in the new Berlin. Litten came to be honoured, if not lionised, in the unified Germany.<sup>32</sup>

Litten's biographer complains that all this hagiography strips Litten of his complexity and his contradictions.<sup>33</sup> There is a lot of force in that observation. However, maybe it is my stage in life, but I also think such hagiography strips Litten's story of its simplicity. Litten was only 28 when he conducted one of the most famous cross-examinations in history and he was not even 30 when his life was effectively over for doing so.

To the distant eye, the subpoena issued to Hitler seems like a stunt. As the Court in the Eden Palace case seemed to realise, Hitler's evidence was far removed from the immediate issue of the defendant's criminal liability and the summons appeared designed to discredit Hitler in the eyes of the middle class whose votes he so desperately wanted. Equally, Litten and his clients were seeking to confront a menace that the political and law enforcement establishment could not, or would not, address; the systematic violence carried out at the street level to destabilise and subjugate the Nazi Party's political opponents. Litten and his cohort did not approach the courts because they had a benevolent view of the Weimer Republic's judiciary. They approached those courts because they had nowhere else to go.

I do not seek to lionise Litten or to criticise him, although his physical and moral courage are undeniable. I see him as someone very young and inexperienced who charged into extraordinary circumstances as political extremism took hold. In fact, my objective is *not* to judge him and especially not do so from the safe and comfortable distance of what is, when all is said and done, a stable liberal democratic system functioning 100 years later on the other side of the world. Instead, my simple point is that when a political system starts to break down, its disputes spill over into the courts and eventually poison them. Again, we do not have to look far to see that process

commencing. When that starts to happen, others will have to confront the circumstances that Litten faced.

### **Mandela's Subpoena**

Another entry in my hypothetical and unread book of great subpoenas is a subpoena issued out of the Pretoria High Court in 1998. The proceedings were a challenge to a decision to establish an inquiry into the management of the South African Rugby Football union. The recipient of the subpoena was the person who made that decision and the seventh lawyer I will mention, one Nelson Mandela, then President of South Africa. The subpoena was undoubtedly an abuse of process given Mandela's status as head of state. There were also good political reasons for President Mandela not to attend for questioning; the presiding judge was said to personify the burning embers of apartheid.

Despite these misgivings, Mandela refused to challenge the subpoena. He insisted on attending. He said that it was important in the transformation of South Africa that the President be seen to not to be above the law.<sup>34</sup> Sure enough, Mandela gave evidence, and sure enough the judge ruled against the government and was critical of Mandela. However, the new Constitutional Court later overturned the decision.<sup>35</sup> Like in most other things, Mandela was vindicated in the end.

### *Kentridge and Fischer*

Now Mandela's commitment to the rule of law was extraordinary given, or maybe because of, his experiences with the South African judicial system. And that brings me to my other main narrative. It is not so much a tale of a dictator and a lawyer but a tale of a dictatorial system and two lawyers.

In 1948 the National Party were elected in South Africa and proceeded to enact laws to establish the system of forced segregation and subjugation of the non-white, mostly African population, known as apartheid. To that time the independence and competence of the South African judicial system was generally respected, but it was tested, and some would say co-opted, over the ensuing decades. An independent

judiciary upholding the rule of law on the one hand, and a cruel and dictatorial system as existed under apartheid on the other, cannot co-exist for ever. Ultimately, one has to give. The Nazis got rid of independent courts and judges swiftly and completely. The South Africa legal system was compromised by the regime one step at a time as the needs of apartheid demanded it.

The eighth lawyer the subject of this speech is Sidney Kentridge, later Sir Sidney Kentridge QC. He was born in South Africa and practised at the South African Bar from 1949 to the late 1970s before moving his practice and his home to the United Kingdom. He had a vast practice as a barrister and was at the forefront of the seminal trials and inquiries during the apartheid years. I have heard many lawyers described by the quality of their clients, but Kentridge tops them all. He acted for no less than three winners of the Nobel Peace Prize, one of whom was Mandela.<sup>36</sup> Kentridge is truly a living legend, and I cannot do his extraordinary career even a modicum of justice. He (successfully) argued his final case in the Supreme Court of the United Kingdom at the sprightly age of 90.<sup>37</sup> Kentridge is about to turn 102 so I think that makes him a KC and not a QC, although that is a touchy subject around these parts.

The ninth lawyer I will mention was a former and more senior colleague of Kentridge at the South African Bar, Abram Fischer QC, or Bram Fischer as he was better known. Fischer was a relative rarity. He was of impeccable Boer pedigree but he detested apartheid. His grandfather had been Prime Minister of the Orange River Colony, his father was Judge President of the Orange Free State, and his wife was a niece of former Prime Minister, Jan Smuts. After studying at Oxford in the 1930s, the significance of which I will come to, Fischer started at the South African Bar in 1935.<sup>38</sup> He took silk in 1951.

### *Two Big Trials*

Fischer and Kentridge appeared side by side in the so-called "Treason Trial" when for over four years from 1956 to 1961 the South African State tried to prove that 156 people associated with the resistance to apartheid, including Mandela, were guilty of treason. The trial proved to be a disaster for the regime as they changed their

indictment and over time kept dropping defendant after defendant. In the end the remaining accused, including Mandela, were swiftly acquitted.

Fischer led the defence team at the next big apartheid trial known as the "Rivonia Trial". After the Treason Trial, the regime learnt from its mistakes and prosecuted Mandela and other leading resistance figures under new sabotage laws that carried a maximum sentence of death.<sup>39</sup> Other than Mandela, most of the defendants were arrested at a meeting at a farm in the Johannesburg suburb of Rivonia. The trial lasted for 8 months. Although Fischer and the defence team were able to whittle away the prosecution case, the defendants were always going to be convicted. Even so, in arguably the most historically impactful plea in mitigation in history, the defendants, including Mandela, were able to avoid the death penalty.<sup>40</sup> Given life imprisonment instead, they were packed off to Robben Island and Mandela's long walk to freedom commenced.

### *Fischer's Other Life*

Kentridge and Fischer appear to have had much in common. As I said, Fischer was the more senior, but both were successful barristers with broad commercial practices,<sup>41</sup> both were members of the Bar Council,<sup>42</sup> and both answered the call in political trials that challenged apartheid. However, there was one sharp difference between the two.

Outside of court, Kentridge was not politically active, although no one would doubt where his sympathies lay. Fischer on the other hand was a dedicated communist having joined the South African Communist Party sometime around the start of the second world war,<sup>43</sup> after being radicalised at Oxford in the 1930s. In 1950 the *Suppression of Communism Act 1950* (South Africa) was passed which outlawed the Communist Party.<sup>44</sup> Fischer and the rest of the party leadership agreed that the party would dissolve,<sup>45</sup> but it was later secretly re-formed with a clandestine structure.<sup>46</sup> Up until the party was banned, Fischer moved easily between his life as a barrister, with a commercial specialty in minerals and water rights, and his party membership. To give you some insight, in late 1951 Fischer received two letters from the Minister of Justice; one advising him that he was on a list of named communists and liable to

restrictions on his civil rights and another congratulating him on his appointment as a KC.<sup>47</sup>

By the early 1960s Fischer was a member of the Communist Party's central committee.<sup>48</sup> His involvement in the resistance to apartheid was such that it was only by chance that he was not at the particular meeting at Lilliesleaf farm that led to the arrest of the defendants at the Rivonia Trial.<sup>49</sup> He appeared for a number of those charged, even though he was a party to the very plan of sabotage that the prosecution had set out to prove.<sup>50</sup> So acute were the ethical issues for him in the trial, and the danger that he was exposed to, that when some of the farm workers gave evidence of who had attended meetings at the farm Fischer had to absent himself from court in case they identified him.<sup>51</sup> Incriminating documents written by Fischer were tendered at the trial, but the handwriting expert identified someone else as the author.<sup>52</sup>

### *Fischer's Trial*

At least by the time the Rivonia Trial concluded the authorities were onto Fischer. In July 1964 he was arrested, questioned, and kept in solitary confinement for three days. On 23 September 1964 he and 13 others were arrested and charged with offences under the *Suppression of Communism Act 1950*.<sup>53</sup> However, to everyone's amazement, Fischer was granted bail to travel to London, and, to even more amazement, he went and returned to face trial.

So why was he granted bail? Well he was granted bail because he had a brief to appear in a trademark appeal in the Privy Council!<sup>54</sup> It shows how sheltered my life has been, or to put it another way how relatively settled this country has been in my lifetime, that I can only shake my head in wonder at the prospect of a prominent commercial silk obtaining bail on charges of being a leading communist so that he can duck out of the country to run an appeal in a trademark case.

Fischer's trial commenced in November 1964 and proceeded for two months before the next twist. By late January 1965 it seemed clear that Fischer and his co-accused would be convicted. Fischer then absconded. He left a note for his embarrassed Counsel explaining that he meant no disrespect to the Court, but he believed that it

was "the duty of every true opponent of this government to remain in this country and to oppose this monstrous policy of apartheid".<sup>55</sup>

To that time in his life Fischer had not been confronted with a choice between his life as a barrister and his political beliefs. Fischer was not like a Cambridge spy pursuing a comfortable life as a QC paying lip service to the law while secretly being a communist who despised the legal profession as bourgeois servants of a capitalist ruling class. To the contrary, Fischer believed in both the law and communism. He saw them as consistent even though to many others they appear contradictory. But when Fischer absconded, he realised the Rubicon had been crossed. He told his lawyer: "I can no longer serve justice in the way I have attempted to during the past thirty years. I can do it only in the way I have now chosen".<sup>56</sup>

When Fischer went into hiding his trial went in abeyance. His co-accused were convicted and imprisoned. Under pressure from the government<sup>57</sup> the Bar Council moved to have Fischer disbarred.<sup>58</sup> From his hiding place Fischer retained Kentridge to act for him. Kentridge argued that Fischer's conduct in absconding was not undertaken in the course of his practice as a barrister and could not be regarded as dishonourable given that it stemmed from Fischer's political beliefs.<sup>59</sup> This submission embodied the contradictions in trying to maintain a legal profession bound by ethical rules where that profession must operate within a legal system that upholds autocratic and oppressive laws. Anyway, Kentridge's arguments were to no avail and in November 1965, while he was still in hiding, Fischer was struck off.

Meanwhile Fischer was hiding in Johannesburg in plain sight. He lost weight, shaved most of his hair, dyed the rest, grew a goatee, and started smoking a pipe.<sup>60</sup> Eventually his time as South Africa's most wanted came to an end. Nine days after he was disbarred, he was arrested again. The State was now angry. To his original charges he now faced a charge under the *Sabotage Act 1962* (South Africa) that carried the death penalty,<sup>61</sup> along with a host of other charges. Needless to say, bail was out of the question.

By now Kentridge had taken silk and again agreed to act for his friend. It must have been a miserable trial to appear in. A number of former communists turned state's

witnesses so that conviction was a foregone conclusion. Kentridge tore strips off these informers, but the broad strokes of the prosecution case were confirmed by Fischer who gave a statement from the dock that lasted five hours. He denied the most serious aspects of the allegations against him but explained his loathing of apartheid and his determination to resist its laws. He said he had a "higher duty" to oppose immoral laws and an "additional duty cast upon [him] that, at least, one Afrikaner should ... protest actively and positively".<sup>62</sup>

Fischer was convicted. In a move that appalled the judge, the State prosecutor sought the death penalty. Instead, Fischer was given life imprisonment.<sup>63</sup> He was now 58 years old.

### *Prison, Death, and Vindication*

Prison life was brutal for Fischer. I suspect the cruellest blow was being in jail in 1971 when his 23-year-old son died of complications from cystic fibrosis. Fischer was refused permission to attend the funeral. The tenth and last lawyer I will mention, Arthur Chaskalson, spoke at his funeral in Fischer's stead.<sup>64</sup> Decades later, Chaskalson became the first President of the Constitutional Court of the new South Africa, that being the Court that overturned the decision I commenced this part of my speech with.

After intense international lobbying Fischer was released in March 1975 but that was only when his terminal cancer was so far advanced that he could not cause trouble. He died in April. In the six weeks or so that he was out of jail, he was kept under surveillance. His family were denied his ashes lest they became a shrine to apartheid's opponents.<sup>65</sup>

Since the fall of apartheid, Fischer has been very much restored. In 1995 Mandela himself delivered the first annual Bram Fischer lecture. In his biography Mandela described him as "the bravest and staunchest friend of the freedom struggle that I have ever known".<sup>66</sup> Fischer was posthumously readmitted to the Bar in 2003. The airport in Bloemfontein was renamed the Bram Fischer International Airport. I think

that naming an airport after someone who absconded during a trial shows that at least somebody in South Africa has a sense of humour.

As I said earlier, Kentridge kept going and going. He appeared for the family of Steve Biko at the inquest into his death. With his measured advocacy, Kentridge tore into the State and the lies it tried to construct.

### **The Lawyer in an Unjust System**

Based on my research for this speech, I understand that the post-apartheid years, and especially the Truth and Reconciliation Commission, prompted soul searching about how a lawyer confronted with dictatorships, autocracies and repression around them, but not to them, should respond.

One commentator summed up the options facing the conscientious lawyer as: first, going about your business and hoping the unpleasantness will all go away; second, working within an immoral system trying to mitigate its evils and defend its victims; and third, actively opposing and undermining the system from without.<sup>67</sup> No doubt judges in similar situations have similar choices to make and, just as tonight I am not judging the lawyers I have talked about, I am not judging them and I would caution others against doing so as well.

Amongst practising lawyers, Kentridge undoubtedly believed in the second of those options and he pursued it with great effect. Reflecting on this topic, Kentridge was dismissive of the criticism that lawyers who acted for the defendants in these cases gave a veneer of spurious respectability to an unjust legal system. He noted that within apartheid South Africa there were still fair judges and scope to secure acquittals and just outcomes. He said that almost all of his clients wanted legal representation and saw its value. They might be acquitted or receive a five-year sentence instead of life imprisonment, or worse, the death penalty.<sup>68</sup> What would have been the future of South Africa had Mandela been given the death penalty after the Rivonia Trial instead of life imprisonment?



Fischer tried the second and third of those options before they proved incompatible. He arrived at the fork in the road and accepted that he had to give up, not just the trappings of life as a senior barrister, but his genuine respect for the law even if one disagrees with it, that being an essential notion of what it is to be a lawyer. From his place in hiding after he absconded, Fischer wrote to Kentridge describing his anguish over facing being disbarred:<sup>69</sup>

"When an advocate does what I have done, his conduct is not determined by any disrespect for the law, nor because he hopes to personally 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 that step only when he feels that, whatever the consequences to himself, his political conscience no longer permits him to do otherwise."

If anything I have said has given the impression that Fischer and Kentridge were the only lawyers fighting against apartheid then I apologise. There were so many lawyers of integrity fighting the good fight that they are too numerous to mention.<sup>70</sup> And that is not to mention their clients who pursued the struggle and all the victims of apartheid, especially the millions of non-white South Africans who were denied their humanity. Their story is not mine to tell. The same applies with Litten and Germany but on an even vaster scale.

In recounting the stories of these lawyers, I have simply endeavoured to tell the experiences of some lawyers of conscience who faced various stages in the slide of their countries into autocracy and dictatorship. I will leave you to draw your own conclusion about what all that means for lawyers and the legal systems of those countries who now face that prospect. What I can say for them is that sooner or later, like many of the lawyers I have mentioned, tough choices will have to be confronted and courage will be required.

We are incredibly fortunate that nothing like that prevails in this country. As lawyers we have no justification for disobeying laws we disagree with and the ethical rules that bind us. We are not confronted with the choices and dilemmas these lawyers faced and hopefully we never will be. If we do successfully avoid it all, it will be because of

people like John Perry and Malcolm Blue who nurtured our institutions over so many years.

Thank you for listening.

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<sup>1</sup> Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* (2003) at 318.

<sup>2</sup> The Criminal Court in Moabit.

<sup>3</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 14.

<sup>4</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 20.

<sup>5</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 16.

<sup>6</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 21.

<sup>7</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 22, 51.

<sup>8</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 83.

<sup>9</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 105.

<sup>10</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 83.

<sup>11</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 264.

<sup>12</sup> The "Superior Court Director".

<sup>13</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 264.

<sup>14</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 264.

<sup>15</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 265.

<sup>16</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 268.

<sup>17</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 270.

<sup>18</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 270.

<sup>19</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 94, 271.

<sup>20</sup> Litten's biographer doubts the claim had any underlying truth. He noted that Brüning survived the war but never mentioned any such offer in his memoirs: see Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 95.

<sup>21</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 272.

<sup>22</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 274.

<sup>23</sup> A debate then occurred as to whether Hitler would then take an oath which is apparently an aspect of German procedure that is said to strengthen a witness' evidence. Hitler was eventually sworn: see Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 99-101.

<sup>24</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 102.

<sup>25</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 106.

<sup>26</sup> The verdict was upheld on appeal: see Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 104.

<sup>27</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 105.

<sup>28</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 111.

<sup>29</sup> Hitler personally intervened to dismiss a complaint about Litten's mistreatment: see Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 217. Even though the Nazis were sensitive to foreign criticism, a response under the hand of Ribbentrop refusing a petition signed by 100 distinguished British barristers and public servants was published in full in the Nazi press. That could only have happened because of direct orders from Hitler: see Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 233.

<sup>30</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 241.

<sup>31</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 247.

<sup>32</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 259.

<sup>33</sup> Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (2008) at 259.

<sup>34</sup> 'Relationship between the executive and the judiciary', *Nelson Mandela: The Presidential Years* (Web Page) <<https://tpy.nelsonmandela.org/pages/part-ii-governing/theme-6-the-president-and-the-constitution/6-3-relationship-between-the-executive-and-the-judiciary>>.

<sup>35</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [2000] 1 SA 1 (Constitutional Court).

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- <sup>36</sup> The others being Albert Luthuli, President of the ANC in the 1950s, and Archbishop Desmond Tutu: see Kentridge, *Free Country: Selected Lectures and Talks* (2012) at 174.
- <sup>37</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 1.
- <sup>38</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 104.
- <sup>39</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 281.
- <sup>40</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 319.
- <sup>41</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 163.
- <sup>42</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 163.
- <sup>43</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 147, 151.
- <sup>44</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 185.
- <sup>45</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 188.
- <sup>46</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 193.
- <sup>47</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 194-195.
- <sup>48</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 264.
- <sup>49</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 287.
- <sup>50</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 136.
- <sup>51</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 304.
- <sup>52</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 136. Fischer's biography speculates this was deliberate as the prosecution did not want to jeopardise the Rivonia Trial by implicating Fischer who was leading the defence: see Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 305.
- <sup>53</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 337.
- <sup>54</sup> It appears that leave to appeal was refused. The application for leave to appeal was from the decision of the Rhodesian Court of Appeal in *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma (Pty) Ltd* [1963] 1 SA 699. See also Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 342.
- <sup>55</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 141.
- <sup>56</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 356.
- <sup>57</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 369.
- <sup>58</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 145.
- <sup>59</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 146.
- <sup>60</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 147.
- <sup>61</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 149; Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 406.
- <sup>62</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 158; Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 409.
- <sup>63</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 416.
- <sup>64</sup> Clingham, *Bram Fischer: Afrikaner Revolutionary* (1998) at 428.
- <sup>65</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 160.
- <sup>66</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 161.
- <sup>67</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 161.
- <sup>68</sup> Kentridge, *Free Country: Selected Lectures and Talks* (2012) at 175.
- <sup>69</sup> Grant, *The Mandela Brief: Sydney Kentridge and the Trials of Apartheid* (2022) at 144.
- <sup>70</sup> In this context, it is also necessary to mention George Bizos, a Greek-South African human rights lawyer who campaigned strongly against apartheid. Bizos escaped the German-occupied Greece with his father at the age of 13 before being sent as a refugee to South Africa. In 1949, he gained entry to the University of the Witwatersrand, where he met and became close friends with Mandela. Bizos joined the South African Bar in 1954 and took silk in 1978. During this time, he was part of the legal team representing Mandela at the Rivonia Trial and also represented families of anti-apartheid activists who had been killed during apartheid at the Truth and Reconciliation Commission.