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PRESIDENTIAL ADDRESSES

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Reflections on South Africa's first Black Chief Justice, Ismail Mahomed

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INTRODUCTION: CELEBRATING A NOTABLE JURIST[1]

> The law was in effect Mahomed's life. His visible and strong sense of justice and morality were his touchstone. He regarded the attainment of justice as being the ultimate rationale for all law. This sustained him throughout his illustrious career as an advocate and judge.
>
> (Rose-Innes, 2000)

LSA Presidential Address 2021 (virtual meeting)

Good afternoon! Thank you for attending my talk today. As the airline announcement goes, I know you have many choices, and I am so happy that you chose to join me today.

My address will be a brief tribute to a notable jurist and South Africa's first black chief justice, Ismail Mahomed.[2] I chose to dedicate my address to Justice Mahomed for several reasons. First, I wanted to make Justice Mahomed visible to an American and global audience like the Law and Society Association. When we think about notable South African lawyers and judges, the names that often come to mind are Albie Sachs, Sydney Kentridge, Edward Cameron, Arthur Chaskalson, George Bizos, and a few others. Very few people outside of South Africa, except a small number who have studied the legal and political system there, are familiar with Justice Mahomed and his impressive legacy. Justice Mahomed has featured prominently in one or two volumes that focused on black lawyers in South Africa (Broun, 1999; Ngcukaitobi, 2018).

Second, Justice Mahomed had a profound impact on the law and legal practice in South Africa, both as an advocate during the dark days of apartheid as well as during the transition to a constitutional democracy. He also became the Deputy-President of the newly established constitutional court and the country's first black Chief Justice. Third, Justice Mahomed's story is an inspiring one; it speaks to resilience, fortitude and stoicism and it is one that needs recounting. His story is truly a testament to the strength of the human spirit – one that stands alongside the testimonies of other great South African lawyers. We are all shaped by the historical times and geographical spaces that we inhabit, and the trajectory and narrative of Justice Mahomed's life was no different. Apartheid, the system of institutionalized

Presidential Address 2020

[1]Thank you to Elizabeth Planas for transcribing my remarks. My remarks draw and build upon my contribution to a volume of essays in honor of Justice Mahomed that was published in South Africa in 2020.

[2]The term "black" in South Africa refers to indigenous Africans, Indian people (whom we refer to here in the USA as South Asians) and people who are designated as colored (mixed-race people) as I am. Justice Mahomed was brought up in a small Indian community in the city of Pretoria.

racism and authoritarianism, which was declared a crime against humanity by the United Nations in 1977, largely shaped the way that Justice Mahomed lived his life, his professional choices and his philosophical beliefs and values. Apartheid also had a tremendous bearing on his personal and professional relationships, his approach to the law and how he viewed his place in the wider society.

Finally, I wanted to talk about Justice Mahomed because as socio-legal scholars we continually study and analyze various influences on law, of which there are many. Often an individual or a group of individuals exercise considerable influences on the law. In American legal history we have observed the profound influences of a wide array of judges, including Justice Thurgood Marshall, Justice Robert Jackson, and Justice Ruth Bader Ginsburg, for example (Carmon & Knizhnik, 2015; Gerhart, 2003; Williams, 1998). Justice Mahomed was such an individual. He had a profound influence on South African law, and so I thought his introduction to this audience would make a good topic for a presidential address. Justice Mahomed is also the only person I know of who has served as Chief Justice of two newly decolonized countries, namely Namibia and South Africa, appointed in both as the first black Chief Justice. He is also one of a handful of individuals who has served as a judge on the high courts of Swaziland, Lesotho, and Botswana. Because of the shared British colonial experience, advocates (barristers) within Southern African states could argue cases as well as sit as judges in neighboring states. This was particularly the case in the early years of independence in many societies, when the number of indigenous lawyers were very small. His legal credentials are therefore unsurpassed—and I can comfortably assert that one would be hard pressed to find anywhere a comparable career in the law.

My address about Justice Mahomed also engages with the theme of this conference, which is *crisis*, *healing* and *reimagining*. Crisis may be one of the more appropriate descriptions of the period of apartheid. In short, apartheid was one huge crisis inflicting untold suffering on millions of people, especially black people. Declared a crime against humanity by the United Nations in 1977, the ravages of apartheid, in all its grotesque detail, have been documented and analyzed in a vast literature, both academic and popular. Apartheid was put under the national and global spotlight in the voluminous testimony recorded in the proceedings of the Truth and Reconciliation Commission, where the machinations of state-sponsored racial brutality on a spectacular scale have been memorialized in great detail. Spawning countless books and films, including an Oscar-nominated documentary film, the testimonies of the victims and their families were harrowing, with a full and unblemished display of trauma and emotional devastation left in the wake of the apartheid state's racial terrorism.

It was a crisis that involved the international community and that had a notable influence on the development of international law to stem racism, including the Apartheid Convention and the International Convention on the Elimination of All Forms of Racial Discrimination. Healing is what South Africans have grappled with in the wake of the ravages of apartheid, the most prominent of such healing processes being the Truth and Reconciliation Commission (Andrews, 2004; James & De Vijver, 2000).

Reimagining has been a constant process in South Africa since the establishment of formal democracy there in 1994. Reimagining the constitutional project, especially its transformative possibilities and its prospective benefits for the majority of South Africans, has also been a constant theme in the emerging democracy. Indications of such reimagining include a comprehensive constitutional text, with its generous provisions of social and economic rights, in addition to the traditional inclusion of civil and political rights, and the embrace of international and comparative law. Inscribed into this generous constitution is an array of institutions designed to implement and enforce the range of constitutional rights (Andrews & Ellmann, 2001). It is in this context that I wish to discuss some of the influences of Justice Mahomed and link his contributions to the development of constitutional democracy in South Africa.

The biography of Justice Mahomed has been highlighted elsewhere (Patel et al. 1997-2020). What I will do in this address is to talk about Justice Mahomed as an advocate and as a judge. I highlight and explore discrete experiences and achievements of this great South African patriot, lawyer and judge whose life was cut short far too soon and whose contribution to South African law has yet to be fully appreciated. I will link his advocacy as a lawyer to his jurisprudence as a judge and in doing so will illustrate that linkage through a few cases. In this address I try to weave a thread from Justice Mahomed's life growing up in South Africa, being an advocate, becoming a judge, and his jurisprudence.

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BRIEF BIOGRAPHY

My reflections on the life of Justice Mahomed, although only in a limited way in this address, is based on my recent contribution to a collection of essays in his honor (Andrews, 2020). These reflections are a reminder of the capacity of human beings to thrive despite the greatest odds, to rise above their historical destinies and thereby change not just their own trajectories but those of their societies.

Justice Mahomed was born in July 1931 and he died in June 2000. He lived only 6 years of his life in a democratic South Africa. During the rest, the 62 years prior to democracy in South Africa, he lived in apartheid South Africa. His death came at the age of 68 just 4 years after he was appointed the first black chief justice of South Africa and 5 years after he was appointed the deputy president of the constitutional court. Although his influence on South African jurisprudence is noteworthy, as we will see from the discussion of the cases, his time as chief justice and deputy president of the constitutional court, as well as the chief justice of Namibia, was too brief for him to leave the kind of legacy that we associate with judges who have served for a longer period, often several decades.[3] But even in the short period in which he served in these judicial leadership roles, Justice Mahomed left his mark.

Justice Mahomed grew up in Pretoria, the administrative capital of South Africa. He grew up during the period of colonialism and apartheid in a small very close-knit Indian community. Under the Group Areas Act, various neighborhoods were set aside specifically for the various racial groups then defined by the apartheid government; those designated as colored, Indian, indigenous African, and white. Justice Mahomed was the oldest of six children and he was brought up in a very devout Indian Muslim family. His beginnings were humble, but he had great ambitions—and very early on in his life his talents and skills as a thinker and leader were obvious.

At the University of the Witwatersrand (Wits) Justice Mahomed, then just Ismail, was a brilliant student and he became a student leader. One of his fellow students was Justice Richard Goldstone who later in life became the Chief Prosecutor for the International Criminal Tribunal for Yugoslavia and also a justice on the newly established Constitutional Court of South Africa. Justice Goldstone recalled that Justice Mahomed was an impressive leader with particularly compelling skills of oratory. Justice Goldstone shared with me the very first time that he heard Justice Mahomed speak to a large student crowd at the university. After hearing that speech, Justice Goldstone regarded Justice Mahomed as his hero. What was remarkable about this time was that Justice Mahomed was a student at a university that had been designated under apartheid laws as one set aside for whites only. He managed to obtain permission from the Minister of Indian Affairs (an apartheid era-government department designated to oversee Indians), similar to my experience three decades later, as someone designated as "Colored," who obtained permission from the Minister of Colored Affairs to attend the whites-only University of Natal. For those familiar with the system of apartheid, during the 1950s the system was robust and confident with white supremacy and its official accoutrements firmly entrenched. But inklings of Justice Mahomed's courage and determination, which became a hallmark of his life, were ever present to be witnessed throughout his remarkable life.

ISMAIL MAHOMED, ADVOCATE: PASSION AND ELOQUENCE

I was a law student in the 1980s when I met Justice Mahomed. He was one of South Africa's preeminent defense lawyers involved in some of the most important political trials of the 1970s and 1980s. In many celebrated cases, he made legal history by pushing the boundaries of apartheid law and seeking the crevices that permitted the possibility of interpretive relief from a sympathetic judge. These strategies at times secured freedom for defendants when such results were unthinkable and

[3]I am thinking here of Justice William Brennan, who served for more than three decades, as well as the one of the early chief justices of the US Supreme Court, Chief Justice John Marshall, who wrote the iconic *Marbury v Madison* decision in 1803, and who served as Chief Justice for 34 years.

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sometimes seen as legally unrealistic (Abel, 1995). For much of his practice he was operating in a system without a constitution and bill of rights. Apartheid law was predicated on the Westminster parliamentary system which reinforced the supremacy of parliament and which also embraced a myriad racially discriminatory laws, as well as a barrage of security laws. Pursuing legal victories based on rights were almost Sisyphean (Allo, 2020; Pitts, 1986).

It is always challenging to comment on the contributions of an extraordinary person, since the tendency is to provide a hagiographic account. How do you therefore ensure that your observations honor such a person, a brilliant litigator, highly skillful orator with an exceptional command of the English language, but who could also be irascible, impatient and bad-tempered.

Justice Mahomed had a reputation for being mercurial in temperament, a demanding friend and colleague, fiercely curious and easily offended. The travails of junior colleagues who sat as "second-chair" in trials led by Justice Mahomed are legendary. Often retold with humor and now several decades later, they reflect a man who exerted extraordinarily high standards on himself—and therefore on others too. Describing Justice Mahomed in all his human contradictions is challenging. He was a complicated and enigmatic individual. But his assured and confident external demeanor sometimes belied an inner dissatisfaction, a restlessness, which was a feature of both the tumultuous times in which he lived, as well as the psychological or emotional toll that such times inflicted on him. Because of his experience of growing up in a racist society where he was constantly reminded of his diminished space in a racially hierarchical society, Justice Mahomed was subjected to the full wrath of a racist and authoritarian society—and yet rose to the pinnacle of greatness in that very society. In other words, his outward legal combativeness reflected the deep and painful emotional response to apartheid law and its myriad injustices, which he experienced as a human being as well as a brilliant lawyer. As in most things in life context is everything, and elsewhere I have commented on this aspect of Justice Mahomed's legacy, pointing out that reputations often belie the entirety and complexity of an individual. As I noted, curiosity can be refreshing, that a temperament that displays passion especially for justice often expresses itself in anger and offense and that sometimes that being demanding is the mandate of friendships; it enables personal growth often leading to personal enrichment (Andrews, 2020). As one of his close friends observed:

> Mr. Mahomed's speeches both in Court and out had a baroque grandeur that with its powerful delivery made an indelible impression on all who heard him. Yet this was no empty rhetorical flourish: he lived even his private life at a sustained pitch of merciless self-examination, fierce intellectual honesty and cosmic anguish that while inspirational, was *almost too taxing for those privileged to share some of those intense moments*. Passion and compassion were the leitmotifs of his speech and of his life.
>
> (Mailer, 2000)

Whether addressing a court of law, or an audience outside of the court, or delivering a judgment, Justice Mahomed's arguments and his perspectives were developed with systematic logic always delivered with a passionate eloquence. That passion and that eloquence, combined with legal logic, were the hallmarks of Justice Mahomed both as advocate and as judge. Justice Mahomed's extraordinary facility with words was part of his deep commitment to individual rights and his intense appreciation of the possibilities of law in the pursuit of social justice. His life-long goals were freedom and equality. He passionately believed that the way to those goals, and their best protection when achieved, were law and the judicial process.

The 1980s saw the courtroom drama being played out in some of the most renowned political trials, as those accused of violating apartheid's many laws utilized the dock to call out the injustice of apartheid and to reinforce deeply held political views, as well as their commitment to ending the brutal system. Their lawyers, like Justice Mahomed, channeled their legitimate social justice grievances into the technical language of the law, demanding that apartheid laws sometimes lead to just results (Abel, 1995). Justice Mahomed has been hailed as one of South Africa's finest trial advocates.

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His mastery of administrative law, arguably the lynchpin of apartheid law, rendered him a formidable adversary in the courtroom. His legal skills and knowledge came to be the Achilles heel of the apartheid government in court, especially in his representation of political prisoners. His legal talent ensured that those whom the apartheid government had targeted to be silenced because of their political beliefs often walked out of prison and escaped conviction.

Reinforcing white supremacy in every crevice of political, economic and social life in South Africa, the laws of apartheid were always stacked against black people. With an educational system designed to ensure that black South Africans were subservient, uninformed, and docile, rising above such an intricately designed and entrenched system to suppress black life and black aspirations required enormous physical and mental efforts. Those efforts were apparent in the day-to-day reality of black South Africans. In the courtroom the efforts were herculean (Dugard, 1978).

Reinforcing white supremacy was not just about laws that ensured racial segregation. A battery of security laws ensured that suppressing the political aspirations and human rights of black people could be done under the guise of legality, with compliant judges, all white, reinforcing white supremacy. With all the trappings and erudition of the trial process, and with the status and prestige of their offices, judges achieved apartheid goals, without the messiness of overt violence, although violence was often out of sight (as with torture to elicit confessions, for example) (Dugard, 1978). With meticulously analyzed decisions cloaked in jurisprudential legitimacy, judges with the stroke of a pen could buttress political suppression on a monumental scale, often sending scores of Black political opponents of apartheid to prison and frequently to death row. It was a Kafkaesque bargain: the pantomime of justice was on display, but substantive justice really was absent.

It was into this arena that Justice Mahomed stepped, contradicting at every turn apartheid's grand scheme of black inferiority. For him, legal advocacy was not just a matter of technical defense of those accused under unjust laws. It was a matter of indignation, humiliation and pain. Justice Mahomed dominated the courtroom. He was a heavy hitter who was brought in to bat to conclude and win the game, often ensuring home runs when the odds were clearly stacked against him.

Some of these victories included Justice Mahomed's defense of the United Democratic Front Leadership in the Pietermaritzburg treason trial. The trial was a classic illustration of how the apartheid government was determined to use the courts to stifle political opposition. The state had within its legal armory a range of techniques to remove popular political leaders from their communities. The indictments allowed political activists to be arrested and denied bail; officials drew out the cases through the use of various procedural technicalities, which meant that political activists were in jail for extended periods; and they tortured potential state witnesses so that testimony provided for the state ensured prosecutions.

Justice Mahomed defended the Pietermarizburg defendants with skill and patience, which thwarted the state from being able to convict any of the 16 defendants. His description as "silver-tongued" was reinforced by this legal victory.

Penuell Maduna, a former accused in a different treason trial, who was successfully represented by Ismail, noted the following in an interview with Justice Albie Sachs:

> Ismail was an inspiration to a whole lot of us who had never met Nelson Mandela because here is this colourful person, very expressive in describing anything but one of the most erudite South African lawyers who could quote philosophers and philosophies with ease and with glib. He was that kind of character who actually places issues of justice before the judge, the justice of the cause of the people fighting apartheid before the judge.
>
> (Sachs and Maduna Transcript 2019)

Justice Mahomed insisted on placing justice before the courts, forcing the judges to recognize that the protests were a desperate cry for justice in a society where no legal or political avenue of opposition were open for the majority of citizens to challenge the cruel ubiquity of apartheid laws. His effectiveness in the courtroom, however, was not just about rhetoric, although that was

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important; it was also about skillfully pointing out the procedural omissions and the failure of the apartheid state to attempt to use law to stifle dissent without lawfully adhering to their own procedural requirements.

In my research on Justice Mahomed, I interviewed various people who were his student peers at Wits during that period, who practiced law with him at the Johannesburg Bar, and who were his colleagues on the bench. The picture I paint comes from my conversations with them—and also my friendship with Justice Mahomed.

His experience as a member of the legal profession, a slim minority within a largely white profession, did not shield Justice Mahomed from the many vagaries of racial discrimination and subordination that was visited upon all black people. His elevated status, in a very status-conscious society, made no difference. For example, he was precluded from occupying chambers because they we located in a white area. He was barred from eating in the advocates' chambers dining room on similar grounds. The constant microaggressions to which he was subjected no doubt took a toll on his emotional well-being. Justice Mahomed had a reputation for displaying great anger and some in the legal establishment thought that he was intolerant. But the flashes of fury and the seeming intolerance that he sometimes displayed were predictable by-products of the racial psychic warfare that he endured daily, as a young person growing up in apartheid and as an advocate trying to pursue a career in the law. The irony is that those very qualities, when displayed by white male elites, were barely noticed—but somehow with Justice Mahomed, they were projected as professional aberrations.

Because of the Group Areas Act[4] he was not allowed to be admitted as an advocate in Pretoria, even though he was admitted as an advocate and practiced in the neighboring countries of Lesotho, Botswana, Swaziland, and Zimbabwe. He was allowed to practice in Johannesburg, which is an hour drive from Pretoria. But in Johannesburg, even though he could practice as an advocate, he was not allowed to have his own office in the chambers set aside for advocates.

This period of blatant racial exclusion left an indelible impression on Justice Mahomed. In his speeches he often spoke about the times when law practice for him meant squatting in the offices of supportive white colleagues which were made available for short periods when they had court appearances or other business which took them away from their offices. Law practice meant interviewing clients in the library of the advocates bar chambers. Law practice meant not being permitted to eat in the restaurant set aside for advocates. All of these racial harms left a lasting impression on him and shaped his life in myriad ways.

Justice Mahomed's experience of racial injustice is also a telling story of white liberalism. I was often struck by his anger at white liberal colleagues, some of whom were giants in the anti-apartheid struggle. But why resent allies in the anti-apartheid struggle? This anger now makes sense to me after all these decades, because for Justice Mahomed, who experienced this relentless exclusion and assault on his dignity, personally and professionally, no serious attempts were made by white liberal colleagues to change the status quo. For them, business carried on as usual. Yes, chambers were made available, and some attempts were made to soften the harshness of the impediments placed in Justice Mahomed's way. This was also the situation in which Advocate Duma Nokwe found himself. An indigenous African, he too was not permitted to occupy chambers (Ngcukaitobi, 2018).

It was only the intervention of a white Afrikaner advocate, Justice Mahomed's opponent in a lawsuit and who was representing the apartheid government, that enabled Justice Mahomed finally to obtain chambers in his own name. And this came about only because the Afrikaner advocate wanted to deliver papers to Justice Mahomed's chambers, and he discovered that Justice Mahomed did not have permanent chambers. This Afrikaner advocate approached the Minister of Justice who gave permission for Justice Mahomed to have chambers alongside his white counterparts. The advocate and the Minister

[4]The Group Areas Act 41 of 1950 assigned racial groups to different residential and business sections in the urban areas of South Africa, with prime real estate assigned to white South Africans.

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were members of the Afrikaner Broederbond, a male secret society in South Africa dedicated to a broad vision of white supremacy and the advancement of Afrikaner people. During the apartheid years between 1948 and 1994, the white leaders of South Africa's political, economic and cultural institutions were members of the Broederbond (Wilkins & Strydom, 1979). It is widely believed that this episode, in particular, explains Justice Mahomed's anger and his abrasiveness, especially towards white liberals.

Another impediment for Justice Mahomed in carrying out his law practice was his ability to travel to and reside in the city of Bloemfontein, in the province of the Orange Free State, the home of the Appellate Division of the Supreme Court, then South Africa's highest court. The tradition was for advocates to arrive in Bloemfontein the night before their appearance in court. But under apartheid law, Justice Mahomed, with his racial classification as "Indian," was not legally permitted to stay in the Orange Free State overnight. He therefore had to arrange to leave Pretoria very early in the morning for the 5-h drive to Bloemfontein. If his case was not concluded on the same day, he had to leave the province and return the next day.

Justice Goldstone shared with me a story about an appearance by Justice Mahomed before a conservative Afrikaner judge, who could have concluded a case in a day, thereby allowing then advocate Mahomed to return to Pretoria at the end of the day. Instead, he postponed the case to the next day, forcing Justice Mahomed to return to Bloemfontein the next day, knowing full well the extraordinary inconvenience this would cause him. Such gratuitous racial mean-spiritedness was a feature of life for Justice Mahomed—the constant drumbeat of humiliation and aggressions, macro and micro. For someone as brilliant and sensitive as Justice Mahomed, these racial barriers and their consequences, including constant humiliations, were particularly painful and piercing. These humiliations threw a long shadow over Ismail Mahomed's life as an advocate—and his relationships with his colleagues and friends.

The irony of all of this was that, several decades later, Justice Mahomed was appointed South Africa's first black Chief Justice, where he resided over the Court of Appeal in Bloemfontein.

There was an irony and one could even surmise a sort of rough justice to Justice Mahomed being appointed as the first black Chief Justice of South Africa and to return to live in Bloemfontein. His appointment was obviously the culmination of an extraordinary career undergirded by an unwavering dedication to the rule of law and a commitment to social justice. His dedication and commitment were rare and remarkable because he operated during the years when apartheid was most confident and robust—and he was at the receiving end of a continuous slew of racism and hostility.

As journalist David Beresford noted, the appointment of Justice Mahomed as South Africa's first black Chief Justice "…had several ironies about it, not the least of which was that a man once refused the hospitality of a bed in the judicial capital was now enthroned in it" (Beresford, 2000). When President Mandela made it clear to the Judicial Services Commission that Ismail was his choice for the first Chief Justice of South Africa, 100 judges, all white, drafted a petition to protest the President's preference. They bitterly contested this on the basis that seniority had always trumped everything else in the appointment of the Chief Justice. This resistance to the appointment of a highly competent black judge, who also happened to be serving as the Chief Justice of Namibia at the time, as well as Deputy-President of the Constitutional Court, must have been galling to Justice Mahomed. What must also have been particularly infuriating to Justice Mahomed was the judges who signed the petition attempted to cajole him into withdrawing his candidacy as the most principled and collegial thing to do. These judges, all appointed by the apartheid government, still felt sufficiently entitled and emboldened to make their preferences so clearly and transparently. They conveniently forgot or discounted the memories of Ismail's racial travails as an advocate in Bloemfontein, when the humiliations of not being able to reside overnight in a hotel meant that an appearance before the Appellate Division was always fraught.

As Clifford Mailer observed about the record of racist obstruction and humiliation that Justice Mahomed experienced every time he had a court appearance in Bloemfontein:

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> Not a word was said by that august body of judges, nor indeed by the establishment advocates, including the great and the good liberals who occupied chambers in Johannesburg. They behaved quite disgracefully While practicing as an advocate, Ismail Mahomed was not allowed to eat his lunch in the bar mess with his colleagues until the late 70s because of the Group Areas Act. Not a voice was raised in protest.
>
> (Mailer, 1996)

A few months after his death, the Supreme Court of appeal in Bloemfontein, in a ceremony attended by all the judges as well as members of Justice Mahomed's family, issued a public apology to the late Chief Justice. Although not closing the circle, because these issues live on, at least the apology provided some kind of symbolic recognition of the deep injustice to which Justice Mahomed was subjected and which will remain a stain on legacy of the apartheid legal system, including the judiciary.

ISMAIL MAHOMED, JURIST

As I mentioned earlier in this address, Justice Mahomed's service as a judge was relatively brief, because democracy came to South Africa rather late in his life and because he died relatively young. Justice Mahomed was appointed as a judge in 1993—the transitional period in South Africa and a year before the new democratic government of President Nelson Mandela had been elected. There were 200 judges in South Africa—all 200 were white and male—except for one woman. Justice Mahomed joined the judiciary in 1993 and he was appointed as Deputy President of the Constitutional Court in 1994 and he died in 2000. But despite the brevity of his tenure as a judge, Justice Mahomed's jurisprudence was a testimonial to the principles of justice and equity to which he had dedicated his life, especially as an advocate for political prisoners. Through his judgments, he articulated the constitutional values that had shaped his career as a defense lawyer, even though at the time they had been merely aspirations. His judgments were imbued with great rhetorical vigor and a linguistic flourish that demonstrated his great passion for the law. In interpreting the relevant provisions of the Constitution, he gave them a life and a connectedness to people, highlighting the relevance to the lives of many.

Justice Mahomed's passion for justice, and his insistence of the centrality of law in this project are apparent when you read his judgments. That passion and insistence was also present in his arguments before the court when he served as a defense lawyer during the apartheid years. The new constitutional framework, with its generous embrace and allocation of rights, as well as its transformative potential, served as an inspiration for Justice Mahomed. In his judgments he employed words and phrases in innovative ways, in line with what the constitutional drafters had envisaged. He was particularly eloquent when engaging with the law and constitutional principles and his bouts of verbal flourish were refreshing and inspirational amid the turgid and formal language of law. He gave words life and meaning and his verbal capacity to repel injustice so vividly was a gift. Clifford Mailer refers to Justice Mahomed's speeches within and outside the courtroom as having a "baroque grandeur" that,

> with its powerful delivery made an indelible impression on all who heard him. Yet this was no empty rhetorical flourish: he lived even his private life at a sustained pitch of merciless self-examination, fierce intellectual honesty and cosmic anguish that while inspirational, was almost too taxing for those privileged to share some of those intense moments. Passion and compassion were the leitmotifs of his speech and of his life.
>
> (Mailer, 2000)

As a jurist, Justice Mahomed was at his very best. He could bring to bear in this role his vast knowledge of international and constitutional law, as well as his lifelong appreciation of the balance

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to be struck between individual rights and the needs of society. It is therefore fitting for me to highlight a few judgments which exemplify his appreciation of this balance, as well as his passionate commitment to the constitutional principles of equality of dignity. These judgments also reveal the significant figure that he was in the transitional moment in South Africa, when the urgency of transitioning from authoritarianism to accountability was of the highest priority (Mureinik, 1994). The three cases go to the heart of the questions of equality and dignity, the legacy of apartheid, racial reconciliation, and racial reparations. The first case deals with the death penalty; the second was a challenge to the constitutionality of the Truth and Reconciliation Commission; and the third case involves a challenge to a practice in which fathers who are not married to the mothers of their children were not considered or consulted in the adoption of their children. These judgments grapple with the substantive legal issues, but they also showcase the alchemy of legal skill, passion and penmanship—a hallmark of Justice Mahomed's penmanship.

Outlawing the death penalty

The second case heard by the Constitutional Court after it had been established was *S v Makwanyane and Another*, which challenged the constitutionality of the death penalty. The majority judgment was written by the President of the Constitutional Court, Justice Arthur Chaskalson, but Justice Mahomed penned his own judgment, which provides somewhat of a curtain raiser to the majestic sweep of the judgments that he wrote over the course of his time at the Constitutional Court S v Makwanyane and Another (1995).

Commencing with a summary of the separation of power between the three branches of government, Justice Mahomed referenced how the constitutions of many nations incorporate the national ethos and shared aspirations of the community. He noted discrete details within certain states regarding the appropriate sharing of executive, legislative and judicial power, as well as their limitations and the conditions which trigger those limitations. Focusing his attention on South Africa, Justice Mahomed stressed that the South African Constitution is different from those that preceded it (from the colonial and apartheid eras). The Constitution was a decisive break from the past, retaining only that which is defensible and rejecting,

> that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos…. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism.
>
> (*Makwanyane*, Paragraph 262)

Justice Mahomed then detailed the contrast between the past reality and the future aspirations as incorporated in the Constitution.

Apartheid law assailed the dignity of individuals on the basis of race, ethnicity and gender, among others, perpetuated degrading treatment, and permitted "pervasive and manifestly unfair discrimination," while the Constitution embraced equality and dignity as primary principles. Apartheid laws allowed the violation of a range of procedural rights, including detention without trial, which the Constitution prohibits. Apartheid laws restricted the vote to the minority White population while suppressing significant civil and political rights for the non-White population, such as the freedoms of expression, assembly, association and movement. However, white South Africans who chose to oppose the policies of apartheid also found themselves caught in the crosshairs of the authoritarian state. The Constitution remedies these restrictions and violations with the protection of a range of civil and political rights and by extending the right to vote to every citizen.

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While during apartheid a range of property rights, including the right to acquire and hold property, were arbitrarily denied to Black citizens, the section of the Constitution dealing with the right to property is broad and expansive. Referring specifically to the concept of *ubuntu*, Justice Mahomed elaborated:

> "The need for ubuntu" expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.
>
> (*Makwanyane*, Paragraph 263)

Regarding the death penalty as sanctioning "the deliberate annihilation of life," Justice Mahomed referred to one of his earlier decisions on the Supreme Court of Appeal, in which he stated that the death penalty,

> is the ultimate and the most incomparably extreme form of punishment…. It is the last, the most devastating and the most irreversible recourse of the criminal law, involving as it necessarily does, the planned and calculated termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all humankind.
>
> (*Makwanyane*, Paragraph 263, referring to S v Mhlongo, 1994)

Justice Mahomed noted that the drafters of the Constitution chose not to express either retention of prohibition of the death penalty, thereby leaving it for the Constitutional Court to decide as a matter of constitutionality.

He then pointed out how the death penalty violates key sections of the Constitution, including the right to life, and posed the following question, which he answered with a resounding "Yes":

> Does the right to life guaranteed by section 9, include the right of every person, not to be deliberately killed by the State, through a systematically planned act of execution sanctioned by the State as a mode of punishment and performed by an executioner remunerated for this purpose from public funds?
>
> (*Makwanyane*, Paragraph 269)

Justice Mahomed also pointed to the despair of the person waiting "impotently in custody, for his date with the hangman" while noting that the death penalty manifests a philosophy of "indefensible despair," designating the person to be punished as,

> so beyond the pale of humanity as to permit of no rehabilitation, no reform, no repentance, no inherent spectre of hope or spirituality; nor the slightest possibility that he might one day, successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms protected in … the Constitution, the exercise of which is possible only if the 'right to life' is not destroyed… The finality of the death penalty allows for none of these redeeming possibilities.
>
> (*Makwanyane*, Paragraph 271)

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Referring to the right to dignity in the Constitution, Justice Mahomed noted that the individual right to dignity, enshrined in the Constitution, is invaded by imposition of the death penalty and that the right to dignity of the society at large is also compromised,

> by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place.
>
> (*Makwanyane*, Paragraph 272 citing Furman v Georgia, 1972)

Justice Mahomed stated that he could not reconcile the death penalty with the right to equality, noting the arbitrariness in the judicial process. He opined that the imposition of the death sentence on any particular individual often depends not on objective criteria, but on a range of variable factors, which include the economic resources available to the accused.

Economic factors determine the ability of the accused to obtain skillful and experienced lawyers, the assistance of expert testimony, investigators to pursue potential avenues of investigation, like finding witnesses and evidence that will assist the accused in his defense and credibility. Economic factors also determine the levels of literacy and communication skills of the accused, especially in his relationship with his defense counsel. In addition, class, race, gender and age differences may influence perceptions, even bona fide ones, in the determination of the sentence, as well as the commitment on the part of the police to investigate the case in a thorough and comprehensive manner.

Quoting Justice Blackmun in *Callins v Collins*,[5] Justice Mahomed reinforced the notion that the imposition of the death penalty is not "susceptible to objective prediction" and that "some arbitrariness is inherent in the process". While conceding that arbitrariness also applies with regard to imprisonment, Justice Mahomed distinguished the reality of imprisonment from the death penalty, pointing to their quantitative and qualitative differences.

> The unfair consequences of a wrong sentence of imprisonment can be reversed. Death, however, is final and irreversible. The accused, who is imprisoned, is still able to exercise, within the discipline of the prison, in varying degrees, some of the other rights which the Constitution guarantees to every person. The executed prisoner loses the right to pursue any other right. He simply dies.
>
> (*Makwanyane*, Paragraph 274)

Justice Mahomed also referenced other parts of the Constitution, as well as international human rights law, that point out that the death penalty contradicts the right to be free from torture, cruel, inhumane or degrading treatment or punishment. He concluded his judgment by finding as implausible the arguments that the death penalty worked as a deterrent, suggesting that the assumptions on which those arguments are based are "fallacious and at the least, highly speculative and rationally unconvincing".[6] He also paid short shrift to the argument about the role of retribution in the imposition of the death penalty, noting that retribution might desensitize respect for life per se.

Undoubtedly Justice Mahomed's eloquent words harked back to a time when he defended many political prisoners whose life, but for his defense, may have ended on death row—and the many who

[5]*Collins v Collins* 114 S. Ct. 1127; 127 L.Ed.2d 435 (1994) (Blackmun, dissenting), noting that it "is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative."

[6]Ibid para 289, referring to a survey of research findings by the United Nations, which concluded that the 'research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment—such proof is unlikely to be following. The evidence as a whole still gives no possible support to the deterrent hypothesis.' (United Nations *The Question of the Death Penalty and the New Contributions of Criminal Science to the Matter* (1988) at 110).

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were actually executed. It was not only political prisoners who were subjected to the death penalty; the apartheid criminal laws incorporated a range of non-political crimes as worthy of the death penalty. Most notoriously, the rape of a white woman by a black man often ended with the accused being hanged. The same did not apply when a black woman was raped by a white man. The death sentence was used liberally by the judiciary in South Africa, with some judges notoriously known as "hanging judges." It must have felt very satisfying for Justice Mahomed to close that odious chapter of South Africa's legal history.

Challenging the constitutionality of the truth and reconciliation commission: AZAPO v President of the RSA and Others (1996)

> If there is any single judgment which exemplifies that sensitivity, as well as his eloquence and his passionate commitment to the law, it is his judgment in the case on the constitutionality of the Truth and Reconciliation Commission. That case should be compulsory reading for all students of constitutional law.[7]

One of the earliest and most important cases of South Africa's Constitutional Court, *AZAPO v President of the RSA and Others*, written in 1996, was a challenge to the constitutionality of the Truth and Reconciliation Commission (TRC). The Azanian People's Organization (AZAPO) was the most prominent black consciousness organization in South Africa, drawing it's inspiration largely from the writings of Steve Biko (Biko, 2002). South Africa's TRC came to be seen as one of the most globally admired processes of restorative justice and has in many ways been regarded by many in the international community as the gold standard for commissions seeking to establish national reconciliation in the wake of institutionalized violence and brutality (Andrews, 2004).

The *AZAPO* case provides an interesting prism through which to explore the meaning of Justice Mahomed's contribution to South African law. The facts of this case and its meaning and impact on the project of racial reconciliation and national reconstruction in South Africa intersect with his life.

This case highlighted the limits of individual justice in the face of the national need for reconciliation. It underscored the requirement to step outside of oneself to achieve the greater good and the sober reality that law is politics by other means. This is what Justice Mahomed had to confront as a judge deliberating on these momentous questions, but at the same time confronting his own reckoning of the injustice that he had suffered throughout his life – and what reconciliation and redress meant for him. He wrote an eloquent and poignant decision, but one wonders what pain, anger and resentment he suppressed to produce that elegantly crafted decision.

The applicants in the case, whose relatives had been murdered by agents of the apartheid state, applied to the Constitutional Court for an order declaring the amnesty provisions of the Promotion of National Unity and Reconciliation Act ("the Act") unconstitutional. Under the Act, the Truth and Reconciliation Commission (TRC) had been established and comprised three committees: Human Rights Violations, Reparations and Amnesty. Under the Act the Committee on Amnesty was mandated to grant amnesty to a perpetrator of an unlawful act associated with a political objective and committed prior to 6 December 1993. As a result of the grant of amnesty, the perpetrator could not be held criminally or civilly liable in respect of that act. In addition, the state or any other body, organization or person that would ordinarily have been vicariously liable for such act would be immune from civil and criminal liability.

Much pathos is present as he examined and reviewed the challenged statute, delivering his judgment with a thoughtful and majestic sweep. Early on he recognizes the ravages of apartheid and its legacy:

[7] *Speech by Sir Sydney Kentridge QC at the posthumous handing over of the Sydney and Felicia Kentridge Award to the late Chief Justice Ismail Mahomed on 28 July 2000*. ADVOCATE (Third Term 2000).

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> Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of strong commitment, sensitivity and labour to "reconstruct our society" so as to fulfill the legitimate dreams of new generations …
>
> (*Azapo*, Paragraph 41)

The challenged section survived constitutional muster. The court acknowledged that the Act interfered with the rights of the families to "have justiciable disputes settled by a court of law, or … other independent or impartial forum", and based its finding on the limitations clause of the Constitution as well as the epilogue to the interim Constitution. In particular, the epilogue "provides "a historic bridge" between South Africa's past which was,

> characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> (*Azapo*, Paragraph 48)

The Court noted that the epilogue signified the need for national unity, for reconciliation and for "the reconstruction of society." Further, that the Constitution laid the "secure foundation" for South Africans "to transcend the divisions and strife of the past" and its, "gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge". Emphasizing the constitutional imperatives for reparation and not retaliation, "a need for ubuntu but not for victimisation," the Court gave its imprimatur to the constitutionality of the TRC.

In his judgment Justice Mahomed recognized that amnesty provided the incentive for perpetrators to disclose the truth about atrocities that they committed—and that without amnesty the truth might never come to light. For Justice Mahomed, the imperative for reconciliation and reconstruction was dependent on the truth emerging. In prose that is deeply mindful of the pain and trauma of victims and their loved ones, Justice Mahomed sketches the contours of the national bargain: truth as a precondition for reconciliation. He noted how secrecy and authoritarianism "have concealed the truth in little crevices of obscurity in our history." He then outlines how the TRC was designed to encourage survivors and the dependents of those tortured, wounded, maimed, and killed,

> to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstance it did happen, and who was responsible.
>
> (*Azapo*, Paragraph 17)

According to Justice Mahomed, the truth, which the victims of repression were seeking so desperately to uncover, would be much more likely to be forthcoming if those who were responsible for,

> such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do.
>
> (*Azapo*, Paragraph 17)

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Justice Mahomed believed that without the incentive to disclose the truth, the victims would be bereft of an effective mechanism to encourage perpetrators to disclose and to reveal the truth., With that incentive, namely, immunization from criminal and civil liability, Justice Mahomed believed that "what might unfold are objectives fundamental to the ethos of a new constitutional order." He noted that the families of those who had been subjected to gross violations of human rights would be empowered by the unearthing of the truth. Similarly the perpetrators may be unburdened from long years of guilt or anxiety. Most significantly, Justice Mahomed noted that,

> the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.
>
> (*Azapo*, Paragraph 17)

Justice Mahomed painstakingly pointed out that amnesty was pivotal to the negotiated settlement that gave birth to the post-apartheid democracy. And despite the claims made under international law, he concluded that the amnesty provisions in the Act were not in violation of international law.

I have wondered about the significance of Justice Mahomed writing the judgment in this case, which laid bare the painful exercise of balancing justice, truth, forgiveness and reconciliation. My sense is that Justice Mahomed was really the only one on the court who could write this particular judgment with its holding of constitutional validity for amnesty. Justice, truth and dignity had been the leitmotif of his professional and personal life and his biography no doubt gave the judgment its validity among a large proportion of South Africans, who might otherwise have been skeptical. The words of his judgment suggest that he was able to transcend the pain and trauma of his own life to elevate the need for forgiveness and reconciliation in his judgment. I hope that he did.

Expanding substantive equality

Justice Mahomed also made his mark in the equality jurisprudence of the Constitutional Court. The Constitutional Court has elaborated at length about the meaning of equality, and in its several judgments has applied the equality principle in a manner that is mindful of the context in which the discrimination occurs, and the lived reality of the parties under consideration.[8] In addition, the court has focused on the goal of the Constitution, namely, the achievement of dignity and equality for all South Africans. The court has therefore embraced a substantive definition of equality, as opposed to a mere formalistic one, in effect focusing on the disparate impact of laws, policies and practices, as opposed to their strict equal treatment of the genders (Fraser v The Children's Court, Pretoria North, 1997).

One of the first cases on gender equality, *Fraser v. The Children's Court*, involved an unmarried father who challenged the provisions of the Child Care Act, which permitted the adoption of children born out of wedlock without the consent of the father. For children born in wedlock, the consent of both parents was required. The father successfully challenged the law and it was declared unconstitutional. Ismail penned the majority decision.

In evaluating the Child Care Act, and particularly the gender equality issues raised in this case, Justice Mahomed noted:

[8]See, for example, President of the Republic of South Africa v Hugo, 1997 (4) SA 1 (CC); Bhe and Others v Khayelitsha Magistrate and Others, 2005 (1) SA 580 (CC).

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> In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by single mothers in our society. Any legislative initiative should not exacerbate that disadvantage.
>
> (*Fraser*, Paragraph 44)

Adopting a contextual approach, Justice Mahomed stated that a mother's "biological relationship with the child," nurtured during pregnancy and breastfeeding, is a special one. He also noted that the mother gives "succour and support" to a child that is "very direct and not comparable to that of a father."

This statement in that judgment reminded me of the very strong bond between Justice Mahomed and his mother. I remember when I started my graduate degree at Columbia University in the fall of 1983, Justice Mahomed had just completed a stint at Columbia Law School as a visiting professor. While it is traditional for visiting professors who are married to have their partners accompany them, Justice Mahomed had brought his mother to live with him in Morningside Heights in Manhattan, the location of Columbia University. It would not be an exaggeration to say that Justice Mahomed adored his mother.

I have no doubt that as he considered and weighed the constitutionality of the challenged statute, it was within the context of his knowing and feeling that special bond between mother and child.

But he was also a devout Muslim. As part of the analysis in *Fraser*, Justice Mahomed surveyed the several systems of marriage in South Africa, including some that were not formalized in South African law. Children who were products of such informal unions were rendered illegitimate, therefore disposing of the father's permission for adoption. Such situations of non-recognition placed fathers at an enormous disadvantage *vis à vis* their children with respect to adoption and were therefore facially discriminatory.

In addition, in his judgment Justice Mahomed also considered that the core issue was really the relationship between a father and a child, and that the statute was too broad in its blanket exclusion of the need for an unmarried father's permission for the adoption of his child. Looking at this issue of parent–child–community relationships holistically, Justice Mahomed contextualized those relationships outside of a narrow Western focus, noting that:

> There is a vast area between such anomalies which needs to be addressed by a nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are often quite different from those upon which "first world" western societies are premised; by having regard to the fact that the interest of the child is not a separate interest which can realistically be separated from the parental right to develop and enjoy close relationships with a child and by the societal interest in recognising and seeking to accommodate both.
>
> (*Fraser*, Paragraph 29)

Justice Mahomed recognized that unmarried fathers who have accepted their paternity and parental responsibility may not be indifferent to the welfare of their children and may in fact be appropriately qualified to determine the appropriateness or otherwise of an adoption.

He concluded that drawing a distinction between married and unmarried fathers, as well as between marriage unions recognized in law and those that are not, may be too simplistic. In addition, Justice Mahomed cited the question of adoption as bearing directly on the question of gender equality, stating that:

> In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society. Any legislative initiative should not exacerbate that disadvantage. In seeking to avoid doing so,

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> it may well be that the legislative approaches adopted in 'first-world' countries … should be viewed with caution. The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the 'first-world' countries described.
>
> (*Fraser*, Paragraph 44)

Despite these considerations, however, and citing the best interests of the child, Justice Mahomed declined to allow further appeals to set aside the adoption, but instructed Parliament to remedy the situation in a revised statute.

When reflecting on Justice Mahomed's deliberations and the decision, a few things are worth noting. Justice Mahomed was a devout Muslim and was keenly attuned to the marginalization of non-Christian religions in South Africa, a feature of their small size in the overwhelmingly Christian country. But he was also mindful of the dire state of gender relations in this country, recognizing that attaining the goals of gender equality required not only commitment, but also judicial agility in balancing competing considerations. This case raised a range of issues, including traditional (customary) marriages, the bonds between mother and child, the relationship of fathers to their children, when equal treatment should be balanced with equal outcomes, and the role of law in balancing these various considerations. In a thoughtful and searching analysis Justice Mahomed traversed these issues with poignant insights and great empathy.

CONCLUSION

I hope that my address succeeded in the promise that I made at the outset, namely, to introduce you to a great South African jurist, to honor his accomplishments by providing you with a sketch of his remarkable life and his admirable and endurable contribution to South African law and constitutional jurisprudence. In our contemporary global moment of isolation and trauma, Justice Mahomed's story will hopefully serve as an inspiring antidote.

Thank you.

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