

**2011 Ismail Mohamed Law Reform Essay Competition Award
Ceremony – Keynote Address**

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Chief Justice Sandile Ngcobo

Johannesburg

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Chairperson of the South African Law Reform Commission, Justice

Mokgoro and Vice-Chairperson, Judge Seriti;

The late Chief Justice Mahomed's family;

Commissioners, and the Secretary of the Law Reform Commission,

Mr Palumbo

Mr Edward Beerwinkel of Juta & Co.;

Members of the essay adjudication panel;

Representatives from the Presidency;

Advocate Madonsela, Public Protector;

Justice Bosielo of the Supreme Court of Appeal;

Professor Nhlapo, Deputy Vice-Chancellor of the University of Cape

Town;

Participants of the 2010 Ismail Mahomed Law Reform Competition;

Ladies and Gentlemen

I am deeply honoured to have been invited to address you at the 2011 Ismail Mohamed Law Reform Essay Competition Award Ceremony.

This competition was established in 1999, and was subsequently named in honour of the late Chief Justice Ismail Mohamed. I would like to pay tribute to the South African Law Reform Commission for hosting this annual competition and ceremony, and to Juta & Co for sponsoring this event for the last twelve years. I commend both the Commission and Juta for continuously reminding us of Chief Justice Mohamed's legacy of using the law for the attainment of justice, and thus keeping his memory alive for the promising lawyers of the next generation.

The Ismail Mohamed Law Reform Essay Competition provides young lawyers with the opportunity to cultivate their analytical, research and writing skills. And it challenges young lawyers to think in innovative ways about law reform in our society. I would therefore like to congratulate this year's winners in the LLB category, Mr

Stuart Scott **[APPLAUSE]** and runner-up, Mr Timothy Hodgson **[APPLAUSE]**, and in the LLM category, Ms Sanita van Wyk **[APPLAUSE]** and runner-up, Henri Nkuepo **[APPLAUSE]** for this fine achievement.

I would also like to recognise all the students who participated in the competition. The amount of time and effort that you put in must be regarded as investment for the future. All of you should be proud of yourselves for undertaking the process of rigorous legal research and writing, and for helping the legal community begin to think through important avenues for law reform in our country.

But you could not have achieved this without the support and guidance of your parents, friends, relatives, and your teachers from grade R to law school. All of them have contributed to your achievement, and wherever they are, they must be very proud of you. For this, we must thank them.

It gives me a sense of pride to see such talented and committed young people entering the legal profession.

The mission statement of the South African Law Reform Commission is “[t]he continuous reform of the law of South Africa in accordance with the principles and values of the Constitution to meet the needs of a changing society operating under the rule of law.”¹

South Africa needs talented and skilful lawyers, especially during this formative phase of our nation’s development. Our constitutional jurisprudence is still in a nascent stage, and the contours of our constitutional democracy will be shaped for generations to come based on what we, as lawyers and judges, do now with the Constitution we created in order to build a bridge out of apartheid.

In its Preamble, the Constitution proclaims four goals for the newly established state. They are to:

¹ Mission Statement of the South African Law Reform Commission.

“[1] Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

[2] Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

[3] Improve the quality of life of all citizens and free the potential of each person; and

[4] Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

The achievement of these goals requires fundamental change in the political, social, and economic structures according to which our society had for so long been organised. The Constitution recognises that, on the eve of our constitutional democracy, we were one of the most unequal societies in the world. There were gross disparities in almost every aspect of life, including access to education, housing, social security, health care, and employment, just to name a few.

A commitment to address these disparities lies at the core of our constitutional enterprise. Indeed two of the goals that we have fashioned for ourselves in the Constitution are to establish a new society, “a society based on democratic values, social justice and fundamental human rights” and to “[i]mprove the quality of life of all citizens and the potential of each person.”

I would like to emphasise that the restructuring of our society along more just and egalitarian lines was, first and foremost, an undertaking centred around law reform. This included not only the dismantling of the statutory framework that underpinned apartheid, but the wholesale reformulation of the constitutional values upon which our democracy was to be based.

To facilitate the achievement of the goals articulated in its Preamble, the Constitution established foundational values, which include: human dignity; the achievement of equality and the advancement of human rights and freedoms; and the supremacy of the Constitution and the rule of law.

To give effect to these foundational values, the Constitution introduced a Bill of Rights that guarantees, among other rights, civil and political rights. To alleviate poverty and other adverse socio-economic conditions brought about by our past, the Bill of Rights includes justiciable socio-economic rights. The realisation of these rights is indispensable to the transformation of society that is demanded by our Constitution.

Articulating a robust set of justiciable rights was one key feature of our new Constitution. Another key feature, signalling a marked break from the past, was the supremacy of the Constitution and the rule of law. In stark contrast to the era of parliamentary supremacy that characterised apartheid rule, the new constitutional order was based on the supremacy of the Constitution. Indeed, section 2 of the Constitution, one of the founding provisions, proclaims that the “Constitution is the supreme law” and declares that all “law or conduct that is inconsistent with it is invalid”.

I have said that we must think of the transition out of apartheid and into our new constitutional dispensation as a process centred around law reform. Law reform cannot happen by legislative action alone, however. The courts play a central role in the reform process, and have indeed been tasked with upholding the Constitution and giving effect to the Bill of Rights. It is in the service of these tasks that courts are given the power to “declare . . . any law or conduct that is inconsistent with the Constitution . . . invalid” and, in addition, to “make any order that is just and equitable”.

Lawyers, too, have a crucial role to play in facilitating the reform process necessary to achieve the society envisaged by the Constitution. By using their skills, talent, and energy, they can ensure that the rights in the Bill of rights are a reality for the people of South Africa. Indeed, they have done so in the great tradition of lawyers like the late Chief Justice Mohamed, who understood the critical role of the law in bringing about social change.

Lawyers like Chief Justice Mohamed had a formidable task. They operated under a hostile legal system which was founded on

the doctrine of parliamentary supremacy. Parliament could make a law that violated every conceivable fundamental human right. Courts were powerless to review the legislation. All that lawyers, like Ismail Mohamed, could do was to ameliorate the harshness of apartheid laws, as applied, through artful legal argument and considered advocacy. It required skilful and creative thinking, and an acumen for legal engineering, to achieve this. They managed, in a system underpinned by a matrix of discriminatory laws, to beat the system at its own game.

In the new constitutional order, premised on the supremacy of the Constitution and the rule of law, the Constitution provides a yardstick against which all laws must be tested. And unlike in the past, where courts were precluded from pronouncing on the validity of an act of Parliament, the Constitution not only empowers courts to declare any law or conduct that is inconsistent with the Constitution invalid, but it obliges them to do so.

Lawyers under our constitutional democracy have a new role, their role is to ensure the realisation of the rights in the Bill of Rights

and thus help to facilitate the achievement of our constitutional goal to establish a new society, one that is founded on democratic values, social justice and fundamental human rights. Indeed lawyers are making a significant contribution in ensuring that the rights in the Bill of Rights are a reality, in particular for the poor and vulnerable members of society.

Such contributions are apparent in many of the cases which have come before the Constitutional Court, such as : *Grootboom*, *Hoffman* and *Zondi*.

These cases represent landmark achievements of our new democracy, and have helped brand our new nation as one of the most progressive democracies in the arena of social, economic and cultural rights. As we all know very well, however, the fight to built an egalitarian society in which every person can live in conditions of human dignity, has not yet been won. As Chief Justice Mohamed warned us many years ago:

“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 exposed to real opportunities for advancement denied to preceding generations initially by the execution of apartheid itself and for a long time after its formal demise, by its relentless consequences.”²

Much of your research and writing on law reform has no doubt focused on next steps we can take in this fight, and if we are to ensure that “resources of the state [are] deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest

² *Azapo* at para 43.

sections of the community”, then we need bright young lawyers, such as you, bringing your own imaginations and wisdom to the process.

As lawyers, you will find yourselves uniquely equipped, in terms of education, training experience, and perhaps most importantly, access to the legal system, to be real agents of change in our society. I would therefore encourage you to think of yourselves as each owing duty, as lawyers, to assist in creating and maintaining a just society – the one envisaged by the Constitution. This duty is not confined to public interest law firms or NGOs. I am encouraged by the number of commercial firms that encourage their members to engage in pro bono litigation, and I am pleased to learn that a number of firms participate in Pro Bono.Org and that the Law Societies also have pro bono programmes.

All this is to say: no matter where you find yourselves after graduation, you must keep in mind, in the spirit of this competition, that the building of the new South Africa has, at its core, the continued reform of the law so as to build a just and equitable

society. And it is you who are best-placed to be pioneers of that reform.

As this essay competition was renamed in honour of Chief Justice Mohamed, it is appropriate, I think, to leave you with a quote from the Bram Fischer lecture he delivered in 1998 – two years before he passed on—

“the excitement of this pursuit into the future is immeasurably enhanced by the truths absorbed from the past and the present. For lawyers these include the insistence, at all times, that the attainment of justice must be the rationale for all law; that law cannot be distanced from justice and morality without losing its claim to legitimacy; that the ethical objectives of the law contain the life blood of a nation; that justice must not only be procedurally fair but substantially fair in its execution; that the law must be seen to be fair in its impact on the life of the humblest citizen in search of protection against injustice; that the law is accessible, intelligible, visible and

affordable; and that any retreat from these truths imperils the very existence and status of a defensible civilisation, first by corrosively destroying within it the source of the energy which sustains it and second by provoking disdain, disorder and rebellion from those it seeks to discipline.”

I would once again like to thank the South African Law Reform Commission and Juta & Co for initiating and sponsoring this competition and awards. And above all, I congratulate all of the students for their participation and efforts.

Thank you for giving me your attention.