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Transcript

The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards¹

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¹ This speech draws heavily from the speech delivered on 10 May 2013 at the Conference of Constitutional Jurisdictions of Africa in Cotonou, Benin.

Mogoeng Mogoeng:

The topic I was asked to address this meeting on is 'The Rule of Law in South Africa: Measuring Performance and Meeting Standards'. In my view, it essentially boils down to the role of the judiciary in promoting peace, good governance and sustainable economic development. And at the heart of it is the observance of the rule of law, which the Constitutional Court of South Africa explained in these terms:

'The exercise of public power must ... comply with the constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by the law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'

Even if all others were to be unable to give practical expression to the rule of law, human rights and the constitutional aspirations of the people in any democracy, that constitutional democracy would survive; provided a truly independent body of judges and magistrates, loyal to the oath of office or solemn affirmation, is in place and ready to administer justice to the aggrieved in terms of their oath of office or affirmation.

And that is the oath or affirmation to be faithful to the Republic of South Africa, to uphold and protect the constitution and the human rights entrenched in it and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the constitution and the law. Central to the affirmation or oath of office is the obligation to uphold the foundational values of our constitutional democracy, which include the rule of law, human dignity, equality, freedom, transparency and accountability.

This is the legal philosophy and the vision necessary for the promotion of the rule of law and the economic developmental agenda not only for South Africa and the SADC (Southern African Development Community) region but of the African continent as well. Because African countries face similar challenges albeit to varying degrees, I have decided not to confine my address to South Africa but to deal with the broader African situation.

Africa is a beautiful continent. And Africa is populous, comprises vast tracts of land and is extremely rich in minerals and natural resources. It has what it takes not only to have its people bask in the glory of sustainable economic development and prosperity; but also to enjoy peace and all-round stability in an environment of good governance, facilitated by an independent, efficient and effective court system. And yet reports about Africa are generally negative.

Africa is generally associated with massive corruption, social and political instability, rigged elections, dictatorships, abuse of human rights with near impunity, rampant non-observance of the rule of law, *coups d'état*, sickness and disease, high mortality rate, abject poverty, economic underdevelopment, dependency and in general, the paucity of accountability, responsiveness and good governance.² Yet economists say that the United Kingdom and Switzerland, which do not have the mineral and natural resources we have, with a very small population and a small piece of land, are each richer than all African countries put together.³ We must therefore play our part to reverse this unacceptable state of affairs.

To avoid dwelling on the predictable lamentations of Africa, generally based on what colonization has done to us, and how some superpowers possibly continue to employ more nuanced and sophisticated ways of prospering with our resources at our expense, we need to identify the challenges that strangle the possibility of African people enjoying the peace and the prosperity that this great continent is pregnant with, which African people can change.⁴

The judiciary is the third branch of government; the third arm of the state. There simply can be no state or government without the judiciary in a genuine constitutional democracy. To breathe life into the African dream that is inspired by the desire to break free from centuries of economic oppression, and to recapture the lost glory of Africa, the judiciary in Africa must be more alive to the enormous responsibilities it bears on its shoulders to contribute to the renaissance of Africa.

When the judiciary enjoys both individual and institutional independence and is faithful to its constitutional mandate, then peace, good governance and sustainable economic development is achievable. It must be for this reason that it is recalled in the preamble to the statute of the Conference of Constitutional Jurisdictions of Africa (CCJA); that the Constitutive Act of the

² "25 per cent of Black people and people of Hispanic origin live below poverty level"- 'Discrimination, inequality and Poverty, A Human Rights Perspective'-January 12, 2013-www.hrw.org

³ *Stealing Africa*, "It is Switzerland with no Natural Resources of any kind, they invaded all over the world with their sub-terranean policies of banking and speed money"-*Stealing Africa*-www.topdocumentary.com and see, "Despite these abundance of natural resources, claims suggest that many western nations like the United States, Canada, France and the United Kingdom as well other emerging economic powerhouses like China, exploit African natural resources today, causing poverty in Africa": *Natural Resources in Africa*-enwikipedia.org/Natural_resources_of_Africa

Also and see, 'Why Have The Islamic Countries Failed To Develop Even With Resources Like Oil, While Countries With No Resources Like Switzerland Have Flourished'-Ryan Lackey, [http://www.forbes.com-01/08/2013](http://www.forbes.com/01/08/2013)

Switzerland GDP in 2011-659.3 Billion USD

UK GDP in 2011-2.445 Trillion USD

SA GDP in 2011-408.2 Billion USD

Nigeria GDP in 2011-244 Billion USD

Egypt GDP in 2011-229 Billion USD

⁴ *Annan calls for end to "unconscionable" exploitation of Africa's resources*-Former UN Secretary-General urges David Cameron to use Britain's G8 chairmanship to push for change-<http://www.theguardian.com/business/2013/may>.

Also see, "Virtually all Zambia's Copper mines are owned by corporations and in the last ten years they've extracted Copper worth \$29 billion but Zambia is still ranked one of the twenty poorest countries in the world".-*Steal Africa*, *ibid*

African Union enshrines the commitment of heads of state and government of the Union 'to promote and protect human and people's rights, to consolidate institutions and democratic culture, to promote good governance and the rule of law'. The judiciaries of Africa have, through the CCJA, also committed themselves to supplementing the AU mechanisms to consolidate the rule of law, democracy and human rights. Finally, we recognise again in the CCJA statute that the achievement of the above objectives is 'closely linked to the independence and impartiality of judges'.⁵ And it is to this end that the CCJA and the court system in a true democracy were primarily established.

How then can we, as the judiciary, make this African dream and the renaissance of Africa come true? I am one of those who believe that lasting solutions to our problems are simple but certainly not simplistic. We often fail to address problems that beset our systems and countries because we tend to look for complex and highly sophisticated solutions, when simple and practical ones, borne out of the experiences of others, and our own experiences are at hand and best suited to yield the much needed results.

Why do we not witness in France, Singapore and the UK problems that have become familiar in Africa? We have oil, gas, gold, diamonds, platinum, chrome, coal etc. in abundance, and breath-taking tourist attractions. The UK is the size of a game reserve in South Africa known as the Kruger National Park. South Korea is about the size of a province in South Africa known as KwaZulu-Natal – where Durban is – and Singapore was very poor and insignificant in 1965, but is now rightly counted among the big world economies although it has nothing but its people and a tiny piece of land.⁶ A closer examination of the operations of their judiciaries would, without ignoring the damage done by our painful history, be quite revealing.

Africa desperately needs a truly independent and efficient judiciary in each of its countries to create peace and stability. When citizens know that there is an effective and efficient court system in their country and that arrest, prosecution, conviction and sentence for the guilty is predictable, then corruption and crime in general will go down.

Those who may wish to take power through unconstitutional means would be deterred from forging ahead with their unconstitutional plans by what an independent judiciary in their country could do to them. I asked colleagues in countries like Germany where people cycle freely with no apparent fear of crime even at night what the secret was. And they said the efficiency of the judicial system and the predictability and probability, as opposed to a remote possibility, of paying for one's crime is the reason behind the peace and overall stability the people enjoy.

When the other branches of government know that courts as the guardians of the constitution will

⁵ *The Resolution on the Respect and the Strengthening on the Independence of the Judiciary, called upon member States to "refrain from taking any action which may threaten directly or indirectly the independence and the security of Judges and Magistrates-*<http://www.achr.or/session/19th>

⁶ *"Singapore has a highly developed trade-oriented market and the economy has been ranked as the most open in the world, least corrupt..."-en.wikipedia.org/wiki/economy_of_Singapore*

always do their job without fear, favour or prejudice, they will observe and promote the rule of law.

When it is known that a challenge to the executive's failure to deliver on a constitutional obligation could result in an executable court order against anybody from the president to a mayor, of their own accord government functionaries and role players in business will obey the law of the land, observe business ethics and good governance will materialize.

Good governance stems from compliance with conventional, legislative and constitutional governance prescripts. The entrenchment of the human rights culture, the observance of the rule of law and giving priority to, among others, the realization of the legitimate aspirations of the citizenry in terms of the law, transparency, accountability, responsiveness, the creation of a truly independent and effective corruption-busting machineries, protection of press freedom and the creation of an investor-friendly climate are some of the key ingredients of good governance. For example, the Constitutional Court of South Africa ruled that the corruption-busting body created in terms of legislation was not sufficiently independent to deal with corruption effectively and the relevant legislation had to be appropriately amended to meet the independence requirement.⁷

All of the above conspire to create an investor-friendly atmosphere. When potential investors know that in Africa you will get justice against any law-breaker when defrauded, and when government, business partners or any entity tries to get an unjust or unlawful advantage of them, they will come in droves to invest, given the huge and diligent labour force, the fertile and productive land, the very rich minerals and abundant natural resources we have to offer.⁸

In this regard, the United Nations observed a few years ago that there was a direct link between the capacity of the judiciary to promote the rule of law and facilitate good governance on the one hand, and the willingness of multinational companies to embark upon massive and sustainable economic development on the other.⁹ And a concern was raised about the apparent lack of capacity by African judiciaries and governments to facilitate an investor-friendly environment.

The leadership of the South African judiciary has resolved to make policies, set its own strategic priorities and develop a concomitant implementation matrix, to ensure that South Africa has the fundamentals necessary for the realization of the South African and African dream in place.

⁷ *Glenister v President of South Africa and Others 2011 (3)SA 347 (CC), para 157 as per Ngcobo CJ*

⁸ "While most South Africans support foreign direct investment, they view corruption as the greatest hurdle to attracting it, a survey shows". *Corruption Threatens Foreign Investment, Fin 24, February 5 2013-www.fin24.com*

⁹ "It is widely recognized that good governance is essential to sustainable development. Well-functioning legal institutions and governments bound by the rule of law are, in turn, vital to good governance. Weak legal and judicial systems-where laws are not enforced and non-compliance and corruption are the norm, undermine respect for the law, engender environmental degradation, and undermine progress towards sustainable development...Various United Nations agencies such as the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP), as well as the World Bank and other regional development banks, are directing increasing resources to reform legal and judicial institutions". 'Rule of Law, Good Governance And Sustainable Development'-Morita, Sachiko and Zaelke, Durwood-The World Bank, *Initiatives in Legal and Judicial Reform 3*, <http://www4.worldbank.org/legal> and <http://www.inece.org>

Nationally, regionally and continentally, the judiciary in Africa must also be encouraged to embark on a very brutal individual judge – and institutional introspection.

The starting point I think, is identifying key challenges that inhibit judiciaries in Africa from executing their constitutional mandate efficiently and effectively. Do judicial officers in all African countries enjoy both individual and institutional independence which would insulate them from undue influence and corruption? Do they all have real security of tenure? Are they paid fairly well? Do they have the essential tools of trade? Is there proper judicial self-governance in the area of court administration and do they control their own budget? Even if there is no self-governance in the strict sense, is the executive or hybrid court administration system in place compatible with genuine judicial independence? Is the court budget adequate for the execution of key functions? Is there an effective judicial education system in place? Does the judiciary broadly enjoy the confidence of the populace? If not, why, and what should be done to address those perceptions or realities, as the case may?

We must develop in-house capacity to identify challenges that undermine the efficiency and effectiveness of the judiciary in the continent. That task should be narrowed down to our regions and our respective countries so that we can identify measures that should be employed to get courts back to their rightful place, wherever there is a need to do so. South Africa has done this and is always looking for ways to improve on this.

Peer review mechanisms without undue self-imposition on others must be explored, the exchange of best practices, and finding an effective way of having interference with judicial independence exposed by allied institutions like the associations of solicitors and barristers all require urgent attention.

When the judiciary is under unfair attack in any country, it must be a concern of allied national, regional and continental bodies alike. We must be our brothers' and sisters' keepers.

There is also a need to develop effective communication strategies to disseminate information about judicial institutions and associations, their role and the challenges and role of the judiciary in Africa.

We must find a legitimate way of influencing decisions about changes necessary to secure judicial independence in all African countries, without interfering unduly in the affairs of any sovereign state, given the sensitivities attendant thereto. The academia should speak and write articles more, the organized profession should also echo sentiments on what needs to be done and how, bodies like the International Commission of Jurists should add their voice and we must also work on our own vocal cords as judges about the fundamental changes needed in the judiciaries of African countries. We must find a way to engage with colleagues in the affected countries on how best to work together towards bringing about the necessary changes by the judiciary.

Another avenue to explore is establishing a link between regional structures of presidents and ministers of justice of our respective countries and those of the judiciary. We should not leave it to the regional executive structures to take decisions about judicial structures and matters

without meaningfully involving the relevant leadership of the judiciary. The judiciary must also have a say at AU level about matters that affect them. Our role should not be limited to appointments to regional and continental tribunals or courts which were established without any real engagement with the leadership of the judiciary. We should also be involved in their creation and restructuring.

I believe that that there is peace, good governance and a generally sound economy in countries like Singapore and the UK because the rule of law, human rights and good governance are observed as a matter of course. In those countries courts protect the right of the media to objectively and accurately inform the public; courts are largely efficient and effective; they are not beholden to the executive, parliament, the media, lobby groups or the rich and powerful. Civil disputes are somewhat speedily and justly resolved and investors are apparently happy that the law and those who enforce the law will protect their legitimate business interests if unjustly or unlawfully interfered with. There is good governance, social and political stability largely because courts force the politicians and society to act only in terms of the law.

I am convinced that each African country with a judiciary that operates with the ever-abiding consciousness of its constitutional responsibility to contribute to peace and stability, the observance of the rule of law, good governance and the creation of a climate that is conducive to sustainable economic development and plays its part, will help its country to achieve these noble objectives, and realize the legitimate and constitutional aspirations of the citizens.

If we do so individually and collectively as courts in African countries, then Africa's lost glory shall be recaptured, and we shall assume our rightful place in the community of nations. We shall shed ourselves and our continent of the stigma, the disrespect, marginalization and suffering that we have had to endure for far too long.

Please don't misunderstand me. I am not saying that the judiciary alone can turn things around in a country. But I am saying that the judiciary that is left to do its job well without fear, favour or prejudice has the capacity to significantly change the deplorable conditions that the majority of our people have had to live with over the years.

Each judiciary owes its relevance, significance and support not just to the constitution of the country, its laws and impressive institutions. It also owes its credibility and admiration to the strategic priorities it is able to set for itself; the development of a plan to realize its deliverable objectives with firm time-frames, where practicable; and a credible funding model that would not compromise its independence for projects that require financial resources.

We have, since 13 October 2012, brought together all departments and key institutions under the umbrella of the body chaired by the chief justice. That body is known as the National Efficiency Enhancement Committee. As the name suggests it is designed to ensure that every key role player in the court system carries out its constitutional responsibilities in a way that would ensure that it enhances the observance of the rule of law through efficiency and effectiveness.

We are also running pilot projects on the proper implementation of the case management system

known as Judicial Case Management in five High Courts. This system will in due course be rolled out to all the High Courts and the Magistrates Courts to enhance greater efficiency and the speedy delivery of quality justice to all.

We are also in the process of developing norms and standards and our own capacity to harvest statistics to help us identify performance-related challenges in our courts, timeously, so that we can address them without undue delay.

Our judicial education institute for judges and magistrates has since January 2012 been fully operational.

A national department led by the Judiciary has, since 2010, been promulgated into existence. It is a critical stepping stone towards the establishment of a fully-fledged court administration system led by the judiciary and created in terms of legislation as an entity independent of executive control.

The South African judiciary is thus doing everything within its power to promote and enforce the observance of the rule of law by developing performance monitoring and evaluation standards and ensuring that they are met. This is of course an ongoing process. And in its interaction with other African judiciaries, it not only draws lessons from their experiences but also suggests with all modesty that they consider why it has worked for South Africa.

I thank you.