

Speech by the Rt Hon Don McKinnon, Commonwealth Secretary-General  
at a conference on 'Courting Justice: Rule of Law Reform in Africa' at  
Clifford Chance, London, UK on 26 April 2006

---

Good afternoon ladies and gentlemen.

Far be it for me to begin an address to an audience of lawyers - *and* on the subject of law - with any one of the 44,000 recorded lawyer jokes being circulated on an average Wednesday here in London...

But I *will* quote the lawyer I met last week who, in his mid-50s, has bravely taken on the management (*pro bono* and part-time) of one of our Commonwealth associations. (There are nearly 100 organisations worldwide which bear the Commonwealth name.) He confessed to me that several old legal friends had accused him in his new incarnation of not observing some of his profession's time-honoured practices of obfuscation and equivocation....But the point was that he himself was struck in his new role by the Commonwealth's tendency for straight talking and his need to respond to that.

\*\*\*

I'm delighted to be here, to discuss the topic of rule of law reform in Africa, to be in the company of experts, and to offer you myself some Commonwealth straight talking. So *thank you* for this kind invitation:

- to the Foreign Policy Centre, a centre of innovative thinking, which has turned its attention several years ago in a thought-provoking paper to the future – or not as the Centre speculated – of the Commonwealth
- to Clifford Chance, truly a 'Name' in the legal world
- and also to my own legal team at the Secretariat, headed by Betty Mould-Iddrisu.

I want to talk about the people I represent – which, in today's case, means the citizens of 18 Commonwealth countries in Africa.

From left to right and from top to bottom, that's The Gambia, Sierra Leone, Ghana, Nigeria, Cameroon, Uganda, Kenya, Tanzania, Mozambique, Malawi, Zambia, Namibia, Botswana, Swaziland, Lesotho and of course South Africa, as well as 'outlying' Mauritius and Seychelles

It *is* ordinary people that I represent. That Commonwealth of 53 nations unites not just governments – it unites peoples. It is *for* peoples. Its ties of Empire are long since transcended by the ties of shared beliefs among equal and independent nations – beliefs in peace, equality, justice, and in the twin pillars of democracy and development. And indeed it's primarily in the context of African

democracy and development that I would like to look at our subject of legal reform today.

\*\*\*

2005 was Africa's year. It was the year when politicians, charities, and rock stars turned our gaze on the only continent on the planet which has seen negative growth in the last 20 years. I would summarise '2005 and Africa' as 'an unspoken agreement', based on the one simple premise that Africa's future lies in Africa's hands.

For its part, the international community said it would redouble its efforts on aid, debt relief and above all trade. In parallel, Africa would recommit itself to planning and implementing its *own* strategies for fighting poverty, promoting development and deepening democratisation, while committing itself to providing just, efficient and transparent government across the continent in the service of its citizens.

I *won't* repeat the dizzying and depressing statistics about the size of the development challenge in Africa. The hundreds of millions of our fellow human beings who are out of school, unable to access water and sanitation, or debilitated by diseases like malaria and HIV/AIDS: they almost beggar belief.

\*\*\*

Today I'd like to sketch African rule of law against that background, as I see it, before addressing three questions:

- First, where do deficiencies in the rule of law hold back development and democratisation in Africa?
- Second, where has African rule of law been effectively reformed – by Africans themselves, and by international actors at work in Africa, not least the Commonwealth?
- And third, 'what do we make of all this, and where do we go from here?'

\*\*\*

So I begin with a **picture portrait** – of a legal system which, 50-plus years ago, split roughly into two. In north Africa: 'Islamic Law'. In Africa south of the Sahara: 'customary law' – that is, the law of custom, and the ways and hierarchies in which African societies organised themselves and, where necessary, brought each other to book.

Then, overlay onto that the legal systems imposed by colonisers. Very crudely, the British imposed received law from the UK - statute law and common law. In parallel, they allowed for the continuation of traditional or customary law, especially over family relations in areas such as marriage and inheritance. Meanwhile the other colonising powers (France, Germany, Italy, Portugal) - who practised what was known as the colonial policy of 'assimilation' - imposed their own often Napoleonic law. Cameroon is the most graphic example of the duality of the legal systems in Africa.

As Africa now regains its destiny – dominated by uncertainty for at least the last three decades and now burning bright again – its legal systems are characterised by the curious juxtaposition at the heart of what we tend to call the 'plural legal system'. I see from the programme that Dr. Fareda Abeda will handle this subject in some detail this afternoon.

Across much of Africa there exists two worlds. One world is largely urban, where modernization is evident in terms of the impact of the Constitution, modern Western-oriented laws, a relatively developed physical infrastructure, and the existence of education, health and other social facilities, and economic institutions. The other world, which is predominantly in the rural areas and inhabited by the majority of the people, is hardly touched by the first.

So customary law still sits alongside the imposed version – sometimes overlapping, sometimes contradicting, but more often than not - for the ordinary person - 'a world apart'.

It's an arrangement that houses several systems of dispensing justice.

We have, for instance, the UN international *ad hoc* tribunals such as the special war crimes court which is dealing with Charles Taylor in Freetown, and the Arusha Tribunal trying the perpetrators of genocide in Rwanda and Burundi. Africa also plays host to sub-regional community Courts of Justice like that of West Africa based in Abuja, Nigeria, and the Common Market for Eastern and Southern Africa's (COMESA's) Courts of Justice based in Lusaka.

On the other hand, as I have seen for myself, the King of the Ashanti, Nana Osei Tutu 11, still dispenses his own justice and settles the disputes of his 2 million Ashanti subjects of the Golden Stool, in his own 'court' in Kumasi, Ghana.

\*\*\*

The concern of my first question is to determine where – in what circumstances - the plurality of this system hampers African development. Again, I simplify my answer, by saying that individually and collectively the two coexisting systems let great swathes of justice and development fall between the cracks.

## Take **customary law**.

Millions of people in the largely rural world of Africa look to their traditional rulers and local community structures for development projects, the settlement of disputes, the allocation of land, financial support to the needy and other aspects of social insurance. They have limited access to modern health facilities or other social amenities. As we know, they are mainly farmers or peasants - many of them living below the poverty line. Also, due to unrest and other issues in parts of Africa, a growing proportion of households are headed by women.

The drawbacks of customary law are manifold. For a start, just take its perceived failure to adapt to the expectations created by modern statehood, education, new technology and global development. It lacks a contemporary comprehensiveness. It fails to address the emerging issues and needs of children, women and the disadvantaged.

In addition, it still bears some of the hallmarks of deep-seated and harmful social values and practices. These include:

- female genital mutilation (which, despite being criminalized in many countries, is still prevalent across much of the northern part of West Africa and some East African countries)
- *trokosi*, or enforced female servitude (which persists in southern parts of West Africa)
- prolonged and cruel mourning rites for widows (which we still see practised across most African countries)
- unfair inheritance practices which fail to recognize women's rights to inherit a portion of their husband or male relative's properties (which we still see - despite new legislation - in the majority of Commonwealth Africa)
- trafficking in children for forced labour or as workers in the sex trade (which we see in West and Central Africa)
- accusations and practice of witchcraft, mainly amongst elderly women, which lead to their ostracisation (particularly in some parts of West and Southern Africa).

From these examples, it's clear that the greatest single damage done by the persistence of customary law is to women, children and the poor. How far this has been a bar to our achievement of the Millennium Development Goals - particularly the 2<sup>nd</sup>, to achieve universal primary education; the 3<sup>rd</sup>, to promote gender equality and empower women; and the 5<sup>th</sup>, to promote maternal health - remains a matter for concern. I'm sure these subjects will form part of your discussions this afternoon.

But please note that I am making a link - distinct if indirect - between the social attitudes that are reflected in customary law, and the facts that the majority of African children who do not go to primary school are girls, the majority of those

who drop out of school are also girls, and the majority of those newly infected with HIV/AIDS in Sub-Saharan Africa are girls in the 15-24 age bracket. Perhaps some of you have been following the African school series airing on BBC 2 of late? It has charted girls' real struggle to stay in school.

Second, take the imported law which in the case of Commonwealth Africa is **statutory law**.

And ask why the justice system has not been able to address the problems even of the urban dweller... In my view, it's a combination of the evils of corruption and the challenge of competing priorities in the public sector which has led to the under-resourcing of the courts system, its lack of capacity, and its lack of ongoing training.

An example: Sierra Leone, which is still in the throes of transformation after civil war. We are told it has only 125 lawyers for 6 million people, and 95% of those are based in Freetown. In fact, the majority of Sierra Leone's lawyers are based right here in London.

Or look at The Gambia, which still does not have a law school, and which depends on its neighbouring countries to provide its prosecutors and judges. The former Chief Justice (recently dismissed by the President....) opened the first regional court in 2005.

The justice system itself is in many cases slow and expensive – we are informed that in many African Countries it takes an average of 7 to 8 years to hear a case. In Cameroon we have judges sitting in 24-hour stretches because there are insufficient court buildings. In this environment, how can the poor rural woman look to the court for any sort of redress?

Only two days ago, I read about a collapsed court case against the murdered white owners of a Jo'burg dry cleaners. The SAPA news agency reported the magistrate saying: 'The big problem is that the case has been dealt with in a very, very amateurish way'.

\*\*\*

So where has the rule of law in Africa been effectively reformed – whether by Africans themselves, or by international actors, not least the Commonwealth?

Africa has made great strides in legal reform over the past decade. When the Organisation of African Unity transformed itself into the African Union, it set up NEPAD (the New Economic Partnership for African Development) to inject new purpose into the Union. These initiatives - spear-headed by Presidents Mbeki and Obasanjo amongst others - have been hailed by the international

community, which has been quick to lend support to the Peer Review Mechanisms established under NEPAD.

And of course more can be done: in particular, the African Court of Justice envisaged under the African Charter on Human and People's Rights now needs to be set up, while the recently agreed Additional Protocol on Women's Rights also needs to become reality.

Yet for all these home-grown initiatives, and however much the future resides in *them*, most would claim that it is the international community which has driven this process, and none more than the Commonwealth.

For the 18 Commonwealth countries in Africa, a common shared legal jurisprudence was a sizeable head-start. This was set in stone at the Commonwealth Heads of Government meeting in 1991, when our fundamental principles as an organisation were laid down. The rule of law is one of the threads that binds and safeguards all our most deeply held Commonwealth values.

The Harare Declaration placed democracy fairly and squarely at the centre of our world. Underneath the broad arch of democracy, it stated specifically that it is the role of the justice system, including judges and lawyers, police and prison officers, to guarantee rights and to uphold the law equally for all sections of society. To fulfill their role, said the Harare Declaration, all sections of the justice system need to be impartial, adequately funded, and independent of government. Every Commonwealth member state signed that Declaration.

We believe that this has guided some of the profound change in Commonwealth Africa. At the 1991 CHOGM, for instance, Ghana, Nigeria and Lesotho were each represented by military governments, as were Sierra Leone, the Gambia and Nigeria in Auckland in 1995. There are now no longer any military dictatorships in Commonwealth Africa.

Commonwealth leaders went further in Abuja in 2003 when they endorsed the Latimer House Principles setting out the relationship between parliament, the judiciary and the executive in member countries, and outlining the limits of the power of each.

The Principles were first drawn up in 1998 by four prominent Commonwealth organisations: the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association, and the Commonwealth Lawyers' Association, in part underlining how Commonwealth civil society can have a key impact on decisions made by member governments.

A Pan-African Forum in Nairobi in April 2005 focused on how to help African Commonwealth countries implement the Principles. President Mwai Kibaki of Kenya took the initiative to the Heads of Government Meeting in Malta in 2005, where they agreed that the Principles should form an integral part of the Commonwealths fundamental values. This should at least enshrine the principle of 'security of tenure' for the judiciary across African member states. At the moment, I'm afraid it is lacking in countries such as Gambia and Cameroon.

Commonwealth support for rule of law reform is practical, too. If I may, I'll give a quick-fire listing of some of the things we're doing.

- Strengthening or even drafting national Constitutions (Zambia, Swaziland)
- Drafting national legislation (Botswana, Cameroon, The Gambia, Lesotho, Namibia, South Africa, Uganda, Tanzania)
- Supporting freedom of information
- Monitoring elections and supporting electoral commissions (most recently in Uganda, Tanzania, and Cameroon)
- Training police officers in human rights issues ( West Africa)
- Promoting the independence of the judiciary
- Training of judges and senior court officials (The Gambia and Sierra Leone – for better and quicker management of cases, more public trust)
- Work on women's land rights
- Work on indigenous women's and girls' rights
- Addressing gender-based violence
- Supporting the fight against corruption and the implementation of the UN Convention against Corruption
- Supporting the repatriation of assets illegally moved out of Africa

\*\*\*

My third and final question, with its two parts – what do we make of this, and where do we go from here?

Many of our images of Africa are bad ones, and there is enough evidence to show that there is cause for worry. But that is only part of the story. There is good news coming out of Africa in the areas of peoples' most basic rights and needs: those of health and education. Look too at the incidence of war: 20 years ago, there were as many as 20 armed conflicts in Africa; now – despite the 4 million dead in the DRC's 'Forgotten War' – the actual number of such conflicts can be counted virtually on the fingers of one hand.

The Commonwealth can take some credit here. In the last 2 to 3 years we have seen successful Presidential elections and orderly transfers of government in five of our countries: Namibia, Malawi, Mozambique, Kenya and Uganda.

Only last month, we finished observing the presidential elections in Uganda – they weren't perfect. Which elections in which country are? But our Observer Group made the point that that country could rejoice in an independent judiciary. When the opposition leader Besigye took his case to the court, it ordered the National Electoral Commission to register him as a Presidential candidate despite the fact that he was in jail at the time.

If African countries keep out of the newspapers for a few years, in my view that's a good sign. And it normally means that the rule of law is properly established in their midst. Good things are happening and people are getting the benefit.

But of course, challenges persist. In the worst instances, the last decade has shown us the complete breakdown of the rule of law in places like Sierra Leone, the DRC, Rwanda, Cote d'Ivoire and Liberia. But the lesser instances of the failures of the legal system, as I have indicated, are just as damaging, and are critically hampering Africa's progress.

\*\*\*

I'd like to end therefore with the concluding thought that what's really missing in Africa is – in lawyers' polysyllabic terminology – a 'truly inclusive culture of constitutionalism'. Which, in simpler English, means that precisely every individual and group in society believes that the law is there to uphold not just their basic rights but also their best hopes for growth, and that it's something they must protect and promote. In the same way, we believe the best Parliament is one where everybody in a country feels appropriately represented. Schools, NGOs and media outlets, in particular, have a role to play in this. That's my key message. The culture of inclusive constitutionalism is not yet fully embedded and it needs to be.

Too often we see tensions between the big three – the parliament, the executive and the judiciary. In one week in February 2005, one African Head of State sacked his Master of the Rolls, his Judicial Secretary and his Attorney General – to say nothing of imprisoning his Inspector General of Police, several members of the political opposition, and a female member of the fledgling Bar Association whose only crime was to act as defence counsel to those the President viewed as his political opponents.

Creative, even robust tension is normal everywhere. That's the nature of a democracy that is alive. The objective, though, is to get the checks and balances right so that those tensions can be managed and are not damaging.

That's why I am also ultimately saying today that African nations must do everything in their power to educate people about the rule of law, to build up respect for the rule of law, to ensure the leaders uphold the rule of law, to a point where everyone sees the rule of law not just as a defence but as a source of

hope – the hope of education, health, gender equality, investment and economic opportunity, environmental protection, peace and security. At the heart of rule of law reform should be the development of *good law* - law that is relevant to the people it is to serve. That is what the layman, the potential foreign investor and the peasant rural farmer all want to see, it's what African children deserve.

In the words of the late Pope, John Paul II: 'When freedom does not have a purpose, when it does not wish to know anything about the rule of law engraved in the hearts of men and women, when it does not listen to the voice of conscience, it turns against humanity and society'.

So let's see the rule of law truly engraved in the hearts of men and women in Africa. Thank you.

**ENDS**